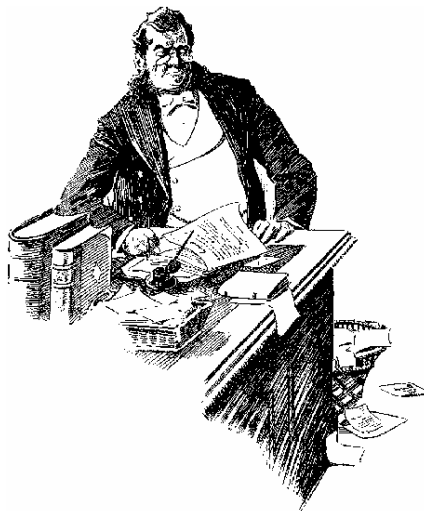
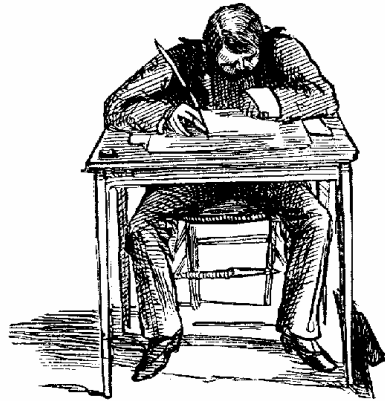


# THE FIFTY-FOURTH GRADUATE COURSE CONTRACT LAW DESKBOOK



## Volume I

Contract and Fiscal Law Department  
The Judge Advocate General's School, United States Army  
Charlottesville, Virginia  
Fall 2005

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# **54TH GRADUATE COURSE CONTRACT LAW DESKBOOK (VOLUME I)**

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## **THE JUDGE ADVOCATE GENERAL'S SCHOOL CONTRACT AND FISCAL LAW DEPARTMENT**

### **BIOGRAPHIES OF PROFESSORS**

**LIEUTENANT COLONEL RALPH J. TREMAGLIO, III**, JA, Professor and Chair, Contract and Fiscal Law Department. B.S., Virginia Military Institute, 1985; J.D., Widener University School of Law, 1992; Judge Advocate Officer Basic Course, 1993; LL.M. Military Law, The Judge Advocate General's School, 1999. Career Highlights: Deputy Staff Judge Advocate, U.S. Army Infantry Center, Fort Benning, Georgia, 2003-2005; Command and General Staff College; 2002-2003; Trial Attorney, Contract Appeals Division, 1999-2002; Senior Trial Counsel & Operational Law Attorney, 1<sup>st</sup> Infantry Division, Wurzburg, Germany, 1996-1998; Chief of Claims, U.S. Army Field Artillery Center, Fort Sill, Oklahoma, 1996; Trial Counsel, U.S. Army Field Artillery Center, Fort Sill, Oklahoma, 1994-1996; Legal Assistance Attorney, U.S. Army Field Artillery Center, Fort Sill, Oklahoma, 1993-1994. Member of the Bar of Maryland & District of Columbia; admitted to practice before the U.S. Supreme Court, Court of Federal Claims, Court of Appeals for the Armed Forces.

**MAJ STEVEN R. PATOIR**, JA, Professor and Vice-Chair, Contract and Fiscal Law Department. B.S., State University of New York, College at Plattsburgh, 1987; J.D., University of Buffalo, 1990; Judge Advocate Officer Basic Course, 1992; LL.M., Military Law, The Judge Advocate General's School, 2000. Career Highlights: Deputy Command Counsel; United States Army Contracting Command, Europe, Wiesbaden, Germany, 2001-2003. Chief, Legal Assistance, and Contract and Fiscal Law Attorney; 1<sup>st</sup> Cavalry Division, Fort Hood, Texas, 1997-2000. Administrative Law and Claims Attorney; V Corps, Hanau Field Office, Germany, 1995-1997. Defense Counsel; Hanau Field Office, Germany, 1994-1995. Legal Assistance Attorney; Eighth U.S. Army, Yongsan, Korea, 1993. Members of the Bars of North Carolina, New Jersey and the District of Columbia; admitted to practice before the U.S. Supreme Court and the U.S. Court of Appeals for the Armed Forces.

**MAJOR ANDREW S. KANTNER**, JA, Professor, Contract and Fiscal Law Department. B.S.F.S., Georgetown University School of Foreign Service (cum laude), 1991; J.D., New York University School of Law, 1994; Judge Advocate Officer Basic Course (Distinguished Graduate), 1995; LL.M., Military Law, The Judge Advocate General's School, 2004. Career Highlights: Administrative and Fiscal Law Attorney, 21<sup>st</sup> Theater Support Command, Kaiserslautern, Germany, 2002-2003; Command Judge Advocate, 5<sup>th</sup> Signal Command, Mannheim, Germany, 2000-2002; Chief, Legal Assistance, Mannheim Law Center, Germany, 1999-2000; Defense Counsel, Yongsan Garrison, Korea, 1998-1999; Administrative Law Attorney, Trial Counsel, and Legal Assistance Attorney, 25<sup>th</sup> Infantry Division (Light), Schofield Barracks, Hawaii, 1995-1998. Member of the Bar of New York; admitted to practice before the U.S. Supreme Court, and the U.S. Court of Appeals for the Armed Forces.

**MAJOR MICHAEL S. DEVINE**, JA, Professor, Contract and Fiscal Law Department, B.A., Pennsylvania State University, 1988; J.D., University of Maryland School of Law, (with Honors) 1995; Judge Advocate Officer Basic Course, (Honor Graduate) 1995; LL.M., Military Law, The Judge Advocate General's School, (Honor Graduate) 2005. Career Highlights: Deputy Officer-In-Charge, Northern Law Center, SHAPE (Mons), Belgium, 2002-2004; Trial Defense Counsel, Katterbach, Germany, 2000-2002; Post Tax Officer, III Corps and Fort Hood, Fort Hood, Texas, 2000; Chief of Military Justice, Task Force Eagle, Tuzla, Bosnia-Herzegovina, 1999; Trial Counsel and Senior Trial Counsel, 1<sup>st</sup> Cavalry Division, Fort Hood, Texas, 1997-1999; Administrative and Operational Law Attorney, 1<sup>st</sup> Cavalry Division, Fort Hood Texas, 1996-1997; Business Manager and Staff, Office of the General Counsel, Contracts Branch, National Security Agency, Fort Meade, Maryland, 1991-1995; Construction Supervisor and Sales Manager, Ryan Homes, Baltimore, Maryland, 1988-1991. Member of the Bar of Maryland; admitted to practice before the U.S. Supreme Court, and the U.S. Court of Appeals for the Armed Forces.

**MAJOR MARCI A. LAWSON**, USAF, Professor, Contract and Fiscal Law Department.

B.A., The Ohio State University (summa cum laude) 1992; J.D., University of Toledo College of Law, 1995; Air Force Judge Advocate Staff Officer Course, 1996; Squadron Officer's School, 2001; Air Command and Staff College, 2004; LL.M., Military Law, The Judge Advocate General's School, 2005. Career Highlights: Deputy Staff Judge Advocate, Office of the Staff Judge Advocate, 314th Airlift Wing, Little Rock Air Force Base, Arkansas, 2003-2004; Staff Judge Advocate, 64th Air Expeditionary Wing (Qatar), February-July 2003; Chief of Claims, Office of the Staff Judge Advocate, 314th Airlift Wing, Little Rock Air Force Base, Arkansas, 2001-2002; Area Defense Counsel, Air Force Legal Services Agency, Charleston Air Force Base, South Carolina, 1999-2001; Chief, Adverse Actions, Office of the Staff Judge Advocate, 437th Air Mobility Wing, Charleston Air Force Base, South Carolina, 1998-1999; Chief, Contract and Environmental Law; and Chief, Legal Assistance and Adverse Actions, Office of the Staff Judge Advocate, 27th Fighter Wing, Cannon Air Force Base, New Mexico, 1995-1998. Member of State Bar of Ohio; admitted to practice before the U.S. Court of Criminal Appeals for the Armed Forces.

**MAJOR MICHAEL L. NORRIS**, JA, Professor, Contract and Fiscal Law Department. B.S., Eastern Michigan University (summa cum laude) 1990; J.D., Wayne State University Law School (cum laude), 1993; Judge Advocate Officer Basic Course (Honor Graduate), 1994; LL.M., Military Law, The Judge Advocate General's School, 2003. Career Highlights: Deputy Command Counsel, U.S. Army Contracting Command, Europe, Seckenheim and Wiesbaden, Germany, 2003-2005; Chief, Criminal Law Division and Chief, Administrative Law Division, U.S. Army Special Operations Command, Fort Bragg, North Carolina, 2000-2002; Brigade Judge Advocate, 3d Recruiting Brigade, Fort Knox, Kentucky, 1998-2000; Defense Counsel, Fort Polk, Louisiana 1998; Defense Counsel, Tuzla, Bosnia-Herzegovina, 1997-1998; Operational Law Observer-Controller, Joint Readiness Training Center, Fort Polk, Louisiana, 1996-1997; Trial Counsel, Fort Leonard Wood, Missouri, 1994-1996. Member of the Bar of Michigan; admitted to practice before the U.S. Supreme Court and the U.S. Court of Appeals for the Armed Forces.

**MAJOR JENNIFER C. SANTIAGO**, JA, Professor, Contract and Fiscal Law Department. B.A., University of Michigan, 1991; J.D., St. Thomas University School of Law, 1995; Judge Advocate Officer Basic Course, 1996; LL.M. Military Law, The Judge Advocate General's School, 2005. Career Highlights: Deputy Officer-In-Charge, Patton Law Center, V Corps, Heidelberg, Germany, 2004; Chief, Military Justice, Combined Joint Task Force 7 and V Corps, Baghdad, Iraq, 2003-2004; Senior Trial Counsel, Mannheim Law Center, 21st Theater Support Command, Mannheim, Germany, 2002-2003; Attorney, Military and Civil Law Division, Office of the Judge Advocate, U.S. Army Europe and 7th Army, Heidelberg, Germany, 2000-2002; Assistant Legal Advisor, Office of the NATO Stabilization Force Legal Advisor's Office, Sarajevo, Bosnia-Herzegovina, 2000; Trial Counsel, 2d Armored Cavalry Regiment, 1/509th Parachute Infantry (ABN) and the Operations Group, Joint Readiness Training Center and Fort Polk, Fort Polk, Louisiana, 1998-1999; Contract Law Attorney, and Chief, Administrative Law, Office of the Staff Judge Advocate, Fort Polk, Louisiana, 1996-1998. Member of the Bar of Florida; admitted to practice before the U.S. Supreme Court and the U.S. Court of Appeals for the Armed Forces.

## **BIOGRAPHIES OF RESERVE PROFESSORS**

**MAJOR DANIELLE M. CONWAY (USAR)**, Associate Professor of Law & Director, Hawai'i Procurement Institute, The University of Hawai'i, William S. Richardson School of Law; Of Counsel, Intellectual Property & Government Contracts, Alston Hunt Floyd & Ing, Honolulu, Hawaii; B.S., New York University, Stern School of Business, 1989; J.D. (cum laude), Howard University School of Law, 1992; dual LL.M., Government Procurement Law & Environmental Law, George Washington University Law School, 1996; Judge Advocate Officer Basic Course, 1993; Judge Advocate Officer Advanced Course, 2000; Command General Staff College, 2005. Career Highlights: 2004 University of Hawai'i Regents' Medal Recipient for Excellence in Teaching; 2003-2004 Outstanding Professor of the Year, William S. Richardson School of Law. Assistant Professor of Law, The University of Memphis, Cecil C. Humphreys School of Law, 1998-2000; Instructor of Law, Georgetown University Law Center, 1996-1998; Assistant Counsel for Policy, Information, and Programs, 1995-1996 & Assistant Counsel for Procurement, 1993-1995, Headquarters, U.S. Army Corps of Engineers, Office of the Chief Counsel, Honors Program. Significant publications appear in the Asian Pacific Law & Policy Journal, the Santa Clara Law Review, the University of Richmond Law Review, the Washington University Global Studies Law Review, and the Howard Law Journal. Admitted to the Bars of the Commonwealth of Pennsylvania, the State of New Jersey, the United States District Court for the District of New Jersey, the District of Columbia, the United States Court of Military Review, and the State of Hawai'i (pending).

**MAJOR KATHERINE E. WHITE (USAR)**, Associate Professor of Law, Wayne State University Law School. B.S.E. Princeton University, 1988; J.D., University of Washington, 1991, LL.M., Intellectual Property Law, George Washington University Law School, 1996. After graduating from law school, Major White served on active duty in the U.S. Army Corps of Engineers, Office of the Chief Counsel's Honors Program. After leaving active duty, she clerked for the Honorable Randall R. Rader, Circuit Judge for the United States Court of Appeals for the Federal Circuit. She received the Fulbright Senior Scholar Award for 1999-2000, hosted by the Max Planck Institute for Foreign and International Patent, Copyright, and Competition Law in Munich, Germany. Elected in November 1998, Major White currently serves as a member of the University of Michigan Board of Regents. Major White served on the United States Patent and Trademark Patent Public Advisory Committee from 2000-2002. From 2001-2002, Major White served as a White House Fellow, serving as Special Counsel to the Secretary of Agriculture, Ann M. Veneman.

**MAJOR STEVEN L. SCHOONER (USAR)**, Associate Professor and Co-Director of the Government Procurement Law Program, George Washington University School of Law. Previously: Associate Administrator for Procurement Law and Legislation, Office of Federal Procurement Policy (OFPP); Trial Attorney, Commercial Litigation Branch, Department of Justice; Commissioner, Armed Services Board of Contract Appeals; practice with private law firms. B.A. from Rice University, J.D. from the College of William and Mary, and LL.M. from the George Washington University. Adjunct Professor, Contract and Fiscal Law Department, The Judge Advocate General's School. Fellow and Member of the Board of Advisors of the National Contract Management Association (NCMA); Certified Professional Contracts Manager (CPCM); Faculty Advisor, the American Bar Association's Public Contract Law Journal; Editorial Board, Public Procurement Law Review (UK); and Advisory Board, The Government Contractor. Co-author (with Professor Ralph C. Nash, Jr.) of The Government Contracts Reference Book: A Comprehensive Guide To The Language of Procurement (published by George Washington University, 2d ed., 1998; 1st ed., 1992).



## **CHAPTER 1**

### **INTRODUCTION TO GOVERNMENT CONTRACT LAW**

<b>I.</b>	<b>COURSE OVERVIEW. ....</b>	<b>1</b>
<b>II.</b>	<b>OVERVIEW OF THE GOVERNMENT CONTRACTING PROCESS.....</b>	<b>3</b>
<b>III.</b>	<b>COMMERCIAL/GOVERNMENT CONTRACT COMPARISON. ....</b>	<b>4</b>
<b>IV.</b>	<b>ROLE OF PUBLIC POLICY IN GOVERNMENT CONTRACT LAW. ....</b>	<b>4</b>
<b>V.</b>	<b>CONTRACT ATTORNEY ROLES.....</b>	<b>5</b>
<b>VI.</b>	<b>CONTINUING EDUCATION FOR CONTRACT AND FISCAL LAW PROFESSIONALS .....</b>	<b>6</b>
<b>VII.</b>	<b>CONCLUSION. ....</b>	<b>8</b>



## **CHAPTER 1**

### **INTRODUCTION TO GOVERNMENT CONTRACT LAW**

#### **I. COURSE OVERVIEW.**

##### **A. Part I - Contract Formation.**

1. The formation phase concerns issues that arise primarily when entering into a contract.
2. Major topics include:
  - a. Authority.
  - b. Competition.
  - c. Methods of acquisition: simplified acquisition, sealed bidding, and negotiations.
  - d. Contract types.
  - e. Socioeconomic policies.
  - f. Protests.
  - g. Procurement fraud.

##### **B. Part II - Contract Performance and Special Topics.**

1. The administration phase concerns issues that arise primarily during performance of a contract.
2. Major topics include:
  - a. Contract changes.
  - b. Inspection and acceptance.
  - c. Terminations for default and for the convenience of the government.

LTC Ralph Tremaglio  
54th Graduate Course  
Fall 2005

- d. Contract claims and disputes.
- e. Environmental contracting issues.
- f. Procurement integrity and ethics in government contracting.
- g. Alternative disputes resolution (ADR).

C. Instructional Material.

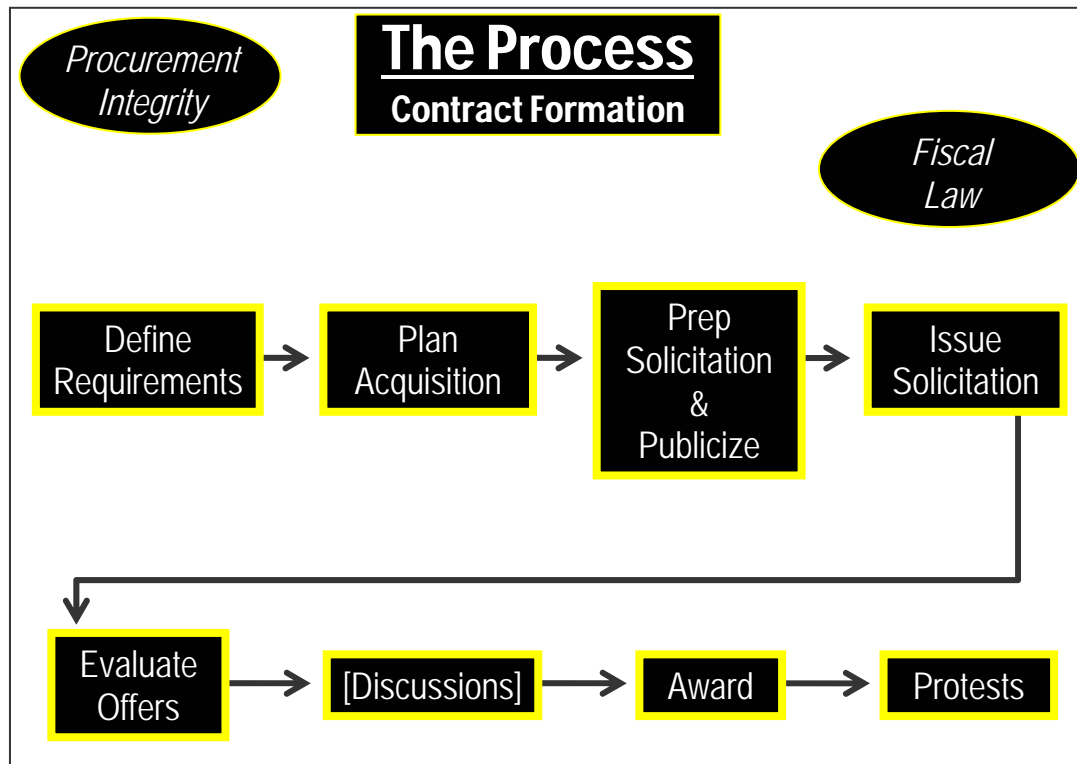
- 1. Government Contract Law Deskbook, Volume I and Volume II.
- 2. Includes seminar problems that require the application of the general principles discussed in the conference sessions.
- 3. Optional reading.
  - a. John Cibinic, Jr., and Ralph C. Nash, Formation of Government Contracts, published by Government Contracts Program, George Washington University, 3d edition, 1998.
  - b. Cibinic and Nash, Administration of Government Contracts, published by The George Washington University, 3d edition, 1995.
- 4. A listing of some contract law terminology and common abbreviations is at Appendix A of the Government Contract Law Deskbook, Volume I. For further review, see Nash, Schooner, and O'Brien, The Government Contracts Reference Book, published by The George Washington University, 2d edition, 1998.

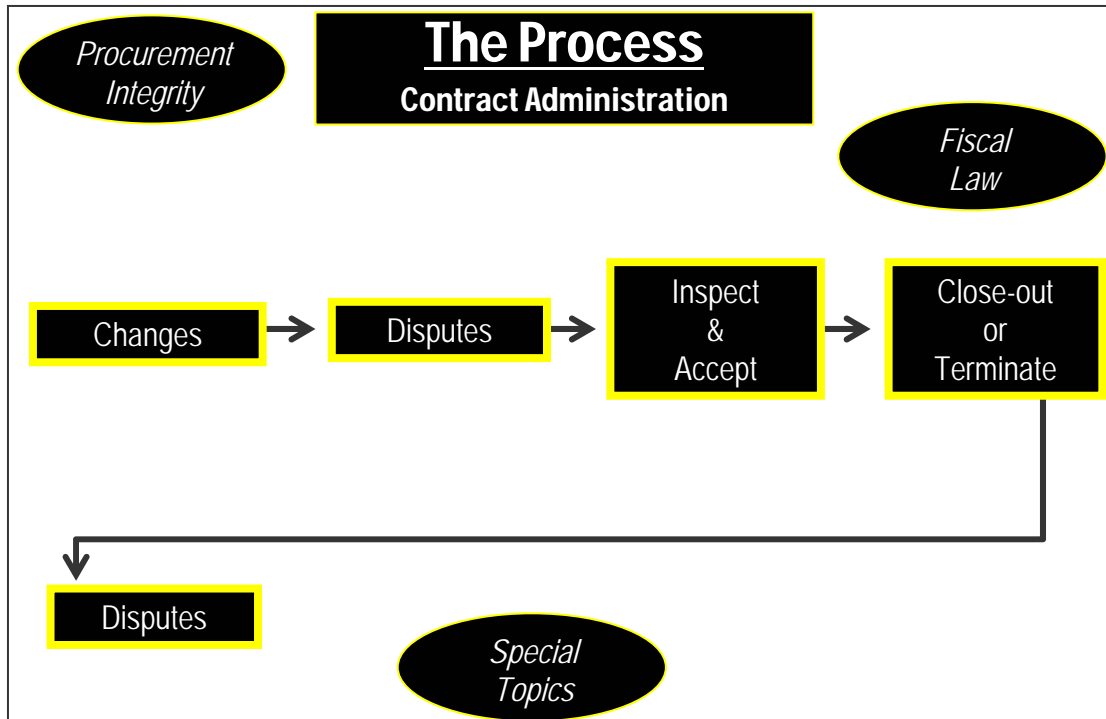
D. Examinations.

- 1. Two examinations – Contract Formation and Contract Administration.
- 2. Multiple choice and essay questions. Open Book.
- 3. Obsessing. . . . Don't.



## II. OVERVIEW OF THE GOVERNMENT CONTRACTING PROCESS.





### III. COMMERCIAL/GOVERNMENT CONTRACT COMPARISON.

- A. Interrelationship of Commercial and Government Contract Law. The government, when acting in its proprietary capacity, is bound by ordinary commercial law unless otherwise provided by statute or regulation.

"If [the government] comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there." Cooke v. United States, 91 U.S. 389, 398 (1875).

- B. Federal Statutes and Regulations Preempt Commercial Law. Government statutes and regulations predominate over commercial law in nearly every aspect.

Our statute books are filled with acts authorizing the making of contracts with the government through its various officers and departments, but, in every instance, the person entering into such a contract must look to the statute under which it is made, and see for himself that his contract comes within the terms of the law. The Floyd Acceptances, 74 U.S. 666, 680 (1868).

### IV. ROLE OF PUBLIC POLICY IN GOVERNMENT CONTRACT LAW.

- A. Objectives of Government Contracting (See, Steve Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 Public Procurement Law Review 103 (2002) available at [www.ssrn.com/abstract=304620](http://www.ssrn.com/abstract=304620).
  - 1. Core Principles: Competition, Transparency, Integrity, Fairness.
  - 2. Socio-economic Policies: i.e. Labor Standards, see FAR Part 22; Foreign Acquisition, See FAR Part 25; Small Business, see FAR Part 19; Other Socioeconomic Policies, see FAR Part 26.
  - 3. Customer Satisfaction.
- B. The Procurement Environment: The Acquisition Workforce
- C. Public Policy and Contract Clauses
  - 1. Clauses required by statute or regulation will be incorporated into a contract by operation of law. G. L. Christian & Assoc. v. United States, 160 Ct. Cl. 1, 312 F.2d 418, cert. denied, 375 U.S. 954 (1963) (regulations published in the Federal Register and issued under statutory authority have the force and effect of law).
  - 2. Clauses included in a contract in violation of statutory or regulatory criteria will be read out of a contract. Carrier Corp., GSBCA No. 8516, 90-1 BCA ¶ 22,409; Charles Beseler Co., ASBCA No. 22669, 78-2 BCA ¶ 13,483 (where contracting officer acts beyond scope of actual authority, Government not bound by his acts).
  - 3. A clause incorporated erroneously will be replaced with the correct one. S.J. Amoroso Constr. Co. v. United States, 12 F.3d 1072 (Fed. Cir. 1993).
  - 4. Contracts tainted by fraud in the inducement may be void ab initio, cannot be ratified, and contractors may not recover costs incurred during performance. Schuepferling GmbH & Co., KG, ASBCA No. 45564, 98-1 BCA ¶ 29,659.

## V. CONTRACT ATTORNEY ROLES.

- A. Advisor to the Commander and the Contracting Officer.
  - 1. Advise on formation and administration phase issues.
  - 2. Advise on fiscal law issues.
- B. Litigator.
  - 1. Litigate protests.

2. Litigate disputes.
  3. Litigate collateral matters before federal bankruptcy, district, and circuit courts.
- C. Fraud Fighter.
1. Advise how to prevent, detect, and correct fraud, waste, and abuse.
  2. Provide litigation support for fraud cases.
- D. Business Counselor.
1. Ensure the commander and contracting officer exercise sound business judgment.
  2. Provide opinions on the exercise of sound business practices.
  3. Counsel is part of the contracting officer's team. FAR 1.602-2; FAR 15.303(b)(1). Army policy requires counsel to participate fully in the entire acquisition process, from acquisition planning through contract completion or termination and close out. Army Federal Acquisition Regulation Supplement (AFARS) 5101.602-2.

## **VI. CONTINUING EDUCATION FOR THE CONTRACT AND FISCAL LAW PROFESSIONALS**

- A. Basic Courses.
1. Contract Attorneys Course (CAC).
    - a. Basic instruction for attorneys new to the practice of contract law.
    - b. Previously offered twice a year; two week course. As of 2005, offered once a year.
    - c. If you have substantial contract law experience and take this as a refresher, please keep the purpose of this course in mind.
  2. Operational Contracting Course.
    - a. Basic instruction for attorneys new to the practice of contract law. Shorter version of the CAC, but with a deployment focus.
    - b. Offered once a year
    - c. If you have substantial contract law experience and take this as a refresher, please keep the purpose of this course in mind.

3. Fiscal Law / Comptroller Accreditation Course.
  - a. Instruction on the statutory and regulatory limitations governing the obligation and expenditure of appropriated funds, and an insight into current fiscal law issues within DOD and other federal agencies.
  - b. Offered numerous times a year -- three times here, up to 150 students; once by satellite from the Air Force Judge Advocate General's School, Maxwell AFB, AL, up to 2700 students; 3-5 times at various locations throughout the world; 4 ½ days.

B. Advanced Courses.

1. Advanced Contract Law Course.
  - a. Covers specialized acquisition topics. Intended for attorneys with more than one year of contract law experience. The focus changes with each iteration of the course.
  - b. Usually offered in alternate years opposite the Contract Litigation Course (next course March 2006); up to 150 students per course; 4 ½ days.
2. Contract Litigation Course.
  - a. Instruction on various aspects of federal litigation before the General Accounting Office, federal courts, and the boards of contract appeals. Scope of instruction includes the analysis of claims, bid protests, contract disputes, and litigation techniques.
  - b. Usually, offered in alternate years with the Advanced Contract Law Course (next course March 2007); up to 150 students per course; 4 ½ days.
3. Procurement Fraud Course.
  - a. Instruction on criminal, civil, administrative, and contractual remedies used to combat procurement fraud.
  - b. Offered every other year (next course June 2006); up to 150 students per course; 2 ½ days.

C. Annual Updates.

1. Government Contract and Fiscal Law Symposium.

- a. Annual survey of developments in legislation, case law, administrative decisions, and DOD policy for experienced contract law attorneys.
  - b. Offered in December at The Judge Advocate General's School; up to 250 students per course; 3 ½ or 4 ½ days.
- 2. USAREUR Contract/Fiscal Law Course.
  - a. To provide USAREUR attorneys instruction on a variety of contract law and/or fiscal law topics, including an annual survey of developments in legislation, case law, administrative decisions, and DOD and USAREUR policy.
  - b. Offered annually in Germany; 50 students per course; 4 ½ days.

## **VII. CONCLUSION.**

## The Players

### GOVERNMENT

Commander  
Comptroller  
Requiring Activity  
User  
Technical Activity  
Contracts Office  
Small Business Advocate  
Competition Advocate  
Legal Office  
Contract Administration Office  
Defense Contract Audit Agency

### CONTRACTOR

Owner / CEO / Shareholders  
Banker & Finance  
Marketers  
Production  
Engineering  
Contract Administration  
Purchasing  
Subcontractors Suppliers  
In-House / Outside Counsel  
Quality Assurance  
Internal Auditors

# **CONTRACT FILE CONTENT CHECKLIST**

INSTRUCTIONS: Set forth below is a list of essential items to be included, as appropriate, in each contract file. The list is not all-inclusive; therefore, Contracting Officers must refer to the Federal Acquisition Regulation (FAR) and other related regulatory material to insure that actions required by Statute, Executive Order and/or Regulation are accomplished and documented in the contract file. The Checklist will be updated periodically and contracting personnel must be alert to any changes in the updated form.

Contracting Officers will indicate hereon the contents of each file when released. Additional papers pertinent to the procurement action will be identified in the spaces provided. Papers will be placed in the file in the order indicated by the numbers (filed consecutively, with the highest number on top).

ITEM NO.	DOCUMENT	APPL & IN FILE	ITEM NO.	DOCUMENT	APPL & IN FILE
1	Purchase Request or Procurement Directive	<input type="checkbox"/>	18	Record of Late Proposals	<input type="checkbox"/>
2	Acquisition Plan	<input type="checkbox"/>	19	Equal Employment Opportunity	<input type="checkbox"/>
3	Source List/Request for Solicitation	<input type="checkbox"/>		a. <input type="checkbox"/> Contractor's Affirmative Action Representation (FAR 22.810)	<input type="checkbox"/>
4	Small Business-Coordination Record (AF Form 3055)	<input type="checkbox"/>		b. <input type="checkbox"/> Contractor's Certification of Nonsegregated Facilities (FAR 22.810)	<input type="checkbox"/>
5	Synopsis Record	<input type="checkbox"/>		c. <input type="checkbox"/> Pre-Award Compliance Action (FAR 22.810)	<input type="checkbox"/>
6	Other Than Full and Open Competition Authority (J & A and Related Correspondence)	<input type="checkbox"/>	20	Contractor's Statement of Contingent Fees	<input type="checkbox"/>
7	Determinations and Findings-Authorization for Use	<input type="checkbox"/>		a. <input type="checkbox"/> Separate Statement Filed Hereunder	<input type="checkbox"/>
	a. Cost Type Contracts	<input type="checkbox"/>		b. <input type="checkbox"/> In Proposal Documents Filed Under Item _____	<input type="checkbox"/>
	b. CPFF Contracts	<input type="checkbox"/>		c. <input type="checkbox"/> SF 119, "Contractor's Statement of Contingent or Other Fees," Filed Hereunder	<input type="checkbox"/>
	c. Incentive Type Contracts	<input type="checkbox"/>	21	Certificate of Independent Price Determination	<input type="checkbox"/>
	d. Personal or Professional Services Contracts	<input type="checkbox"/>		a. <input type="checkbox"/> Separate Statement Filed Hereunder	<input type="checkbox"/>
	e. Architect - Engineer Services Contracts	<input type="checkbox"/>	b. <input type="checkbox"/> In Proposal Documents Filed Under Item _____	<input type="checkbox"/>	
f. Time and Material Labor Hour Contracts	<input type="checkbox"/>	22	Buy American Act	<input type="checkbox"/>	
Other Determinations/Approvals	<input type="checkbox"/>		a. <input type="checkbox"/> Contractor's Certification	<input type="checkbox"/>	
a. Nonpersonal Services (FAR 37.103)	<input type="checkbox"/>		b. <input type="checkbox"/> Approval of Exceptions	<input type="checkbox"/>	
b. Unpriced Order Under Basic Ordering Agreement	<input type="checkbox"/>		23	Exceptions Covering Purchases From Soviet Controlled Areas	<input type="checkbox"/>
c. Call Procurement Arrangement	<input type="checkbox"/>	24		Correspondence Relating to Contractor Performance in a Foreign Country (DFARS 25.870)	<input type="checkbox"/>
d. Warranties	<input type="checkbox"/>		25	Balance of Payments Program Correspondence/Approvals	<input type="checkbox"/>
e. Liquidated Damages	<input type="checkbox"/>	26		Technical Evaluation Memorandum Covering Evaluation of Proposals	<input type="checkbox"/>
Facility Expansion/Modernization	<input type="checkbox"/>		27	Evaluation of Transportation Cost Factors (DD Form 1654)	<input type="checkbox"/>
Contracts With Government Employees (FAR 3.603)	<input type="checkbox"/>	28		Subcontracting Plan (FAR 19.702)	<input type="checkbox"/>
h. Multi-Year (DFARS 17.103-1)	<input type="checkbox"/>		29	Make or Buy Decisions	<input type="checkbox"/>
i. Options-Quantity (FAR 17.205)	<input type="checkbox"/>	30		Request for Pre-Award Survey (PAS) & Results of PAS	<input type="checkbox"/>
j. Options-Exercise (FAR 17.207)	<input type="checkbox"/>		31	SBA Certificate of Competency or Denial of Certificate of Competency	<input type="checkbox"/>
k. Other Determinations/Approvals-To Be Filed Here	<input type="checkbox"/>	32		Contracting Officer's Determination of Contractor's Responsibility	<input type="checkbox"/>
l. Type of Contract (FAR 16.103(d))	<input type="checkbox"/>		33	Authorization to Issue Unpriced Action	<input type="checkbox"/>
9	DD Form 1423 Data	<input type="checkbox"/>		34	Approval of Additional Government-Owned Facilities
	a. <input type="checkbox"/> Correspondence-Requirements	<input type="checkbox"/>	35		Approval of Use of GFP/CFP Fuel and Oil
	b. <input type="checkbox"/> Contractor's Data/Certification (DFARS 27.410-2)	<input type="checkbox"/>		36	Request for Royalty Approval (AF Form 3054)
c. <input type="checkbox"/> Adjusted Priced List (DFARS 15.871(d))	<input type="checkbox"/>	37	Memo Regarding Availability of GFP-Bailment		<input type="checkbox"/>
10	Copy of Special Briefings Made		<input type="checkbox"/>	38	Memo Relative to Reliability and Maintainability (AFR 800-18)
11	Record of Pre-Proposal Conference	<input type="checkbox"/>	39		Approval of Overtime Premiums (FAR 22.103-4)
12	Request for Proposal or Letter Request for Proposal/Quotation and Modifications Thereto	<input type="checkbox"/>		40	Unusual Progress Payment Authority (FAR 32.501-2)
13	"No Proposal" Correspondence	<input type="checkbox"/>	41		Indemnification Approval (DFARS 28.70)
14	Abstract of Proposals	<input type="checkbox"/>		42	Value Engineering Omission Determination
15	Protests Before Award (FAR 33.1)	<input type="checkbox"/>	43		Deviations Approval
	a. <input type="checkbox"/> Agency	<input type="checkbox"/>		44	
	b. <input type="checkbox"/> GAO	<input type="checkbox"/>	45		
c. <input type="checkbox"/> GSBGA	<input type="checkbox"/>	46			<input type="checkbox"/>
16	Unsuccessful Proposals and All Correspondence With Each Unsuccessful Offeror in Chronological Order		<input type="checkbox"/>	47	
17	Successful Proposal and All Correspondence With Successful Offeror Prior to Execution of Contractual Document in Chronological Order.	<input type="checkbox"/>	48		
				49	
			50		

CONTRACT NO.

MODIFICATION NO.

CONTRACTING OFFICER (Signature and Date)



ITEM NO.	DOCUMENT	APPL & IN FILE	ITEM NO.	DOCUMENT	APPL & IN FILE
44	Contractor's Price or Cost Data a. <input type="checkbox"/> In Proposal Under Item _____ b. <input type="checkbox"/> Separate Papers Filed Hereunder	<input type="checkbox"/>			<input type="checkbox"/>
45	DCASR/AFPRO Analyst and/or ACO Pricing Comments	<input type="checkbox"/>			<input type="checkbox"/>
46	Audit Reports	<input type="checkbox"/>			<input type="checkbox"/>
47	Copy of Pre-Negotiation Conferences/Briefings	<input type="checkbox"/>			<input type="checkbox"/>
48	Certificate of Current Cost or Pricing Data a. <input type="checkbox"/> Separate Statement Filed Hereunder b. <input type="checkbox"/> Attached to _____	<input type="checkbox"/>			<input type="checkbox"/>
49	Waivers/Determinations Regarding Cost Accounting Standards (FAR 30.304, 30.3402-2)	<input type="checkbox"/>			<input type="checkbox"/>
50	Price Negotiation Memorandum, Including Weighted Guidelines	<input type="checkbox"/>			<input type="checkbox"/>
51	Computation Used to Arrive at Lowest Evaluated Price/Quantity Discount	<input type="checkbox"/>			<input type="checkbox"/>
52	Reports a. <input type="checkbox"/> DD Form 1499	<input type="checkbox"/>			<input type="checkbox"/>
		<input type="checkbox"/>			<input type="checkbox"/>
		<input type="checkbox"/>			<input type="checkbox"/>
53	Security Requirements a. <input type="checkbox"/> Checklist (DD Form 254) b. <input type="checkbox"/> PCO Determination (AFR 205-4)	<input type="checkbox"/>			<input type="checkbox"/>
54	Evidence of Availability of Funds a. <input type="checkbox"/> Administrative Commitment Documents or Other Appropriate Forms b. <input type="checkbox"/> Other Evidence Shown On _____ Filed at Item _____	<input type="checkbox"/>			<input type="checkbox"/>
55	Request for Writing of Contractual Document	<input type="checkbox"/>			<input type="checkbox"/>
56	Staff Judge Advocate Coordination (AF Form 3059)	<input type="checkbox"/>			<input type="checkbox"/>
57	Individual Procurement Action Report (DD Form 350)	<input type="checkbox"/>			<input type="checkbox"/>
58	Correspondence Regarding Execution of Contractual Document a. <input type="checkbox"/> Letter Transmitting Documents for Signature of Contractor b. <input type="checkbox"/> Miscellaneous Correspondence Regarding Exceptions Taken to Document c. <input type="checkbox"/> Letter Evidencing Contractor's Execution of Document	<input type="checkbox"/>			<input type="checkbox"/>
59	Verification of Requirement	<input type="checkbox"/>			<input type="checkbox"/>
60	Small Business Status Challenges/ Notice to Unsuccessful Offerors	<input type="checkbox"/>			<input type="checkbox"/>
61	Notification of First Time Producer of Parts (DFARS 17.7203(d))	<input type="checkbox"/>			<input type="checkbox"/>
62	Contractual Document a. <input type="checkbox"/> AFAPC b. <input type="checkbox"/> Contractor's c. <input type="checkbox"/> Contract File	<input type="checkbox"/>			<input type="checkbox"/>
63	Notice of Award	<input type="checkbox"/>			<input type="checkbox"/>
64	Local Review Committee Sheet	<input type="checkbox"/>			<input type="checkbox"/>
65	Procurement Committee Contract Approval Record	<input type="checkbox"/>			<input type="checkbox"/>
66	Copy of Report of Contract Award (DFARS S.3)	<input type="checkbox"/>			<input type="checkbox"/>
67	Post-Award Conferences (FAR 42.503)	<input type="checkbox"/>			<input type="checkbox"/>
		<input type="checkbox"/>			<input type="checkbox"/>
		<input type="checkbox"/>			<input type="checkbox"/>
		<input type="checkbox"/>			<input type="checkbox"/>
		<input type="checkbox"/>			<input type="checkbox"/>

# CONTRACT REVIEW GUIDE

## Acquisition Plan

**General:** Acquisition Plans (AP) describe the method by which the Procuring Contracting Officer (PCO) proposes to acquire specified requirements. It is designed as a management tool to insure that the contracting approach is consistent with sound business practices. It may also include a timeline of events for the solicitation. The plan must be approved prior to solicitation release. The reviewer should compare the plan to the solicitation and contract to see if it is being followed. If not, the plan should either be amended or the contract file documented justifying an approved departure from the plan. A Single Acquisition Management Plan (SAMP) may be used in lieu of an AP.

### Primary References:

- ◆ FAR Part 7, Acquisition Planning
- ◆ DFARS Part 207, Acquisition Planning
- ◆ AFFARS Part 5307, Acquisition Planning

### Secondary References:

- ◆ AFMC Acquisition Plan Preparation Guide (Apr 2000) [MS Word]
- ◆ Air Force Single Acquisition Management Plan Guide SAF/AQ (May 2001) [MS Word]
- ◆ Acquisition Strategy Panel (ASP) Secretariat

### Points To Remember:

- ◆ To determine if an AP/SAMP is required, check DFARS 207.103 and AFFARS 5307.104-91
- ◆ Content Requirements for APs and SAMPS are located at FAR 7.105, DFARS 207.105, and AFMCFARS 5307.105
- ◆ The approval process varies depending on the type and dollar amount of the acquisition, check the following regulations to ensure the proper authorities have approved the plan: AFFARS 5307.104-91, AFFARS 5307.104-92, AFMCFARS 5307.104-90
- ◆ The plan should be a stand-alone document that provides sufficient information so that someone unfamiliar with the program will understand what is being proposed. The plan need not be lengthy. A concise, clear statement of the facts and rationale supporting the technical and business judgments is all that is necessary.
- ◆ For international contract matters, it is appropriate in some instances that the foreign purchaser will designate a contractor (or subcontractor) as a "sole source." In such cases, an International Agreement Contract Requirements (IACR) document must be included under Tab 2.
- ◆ If overseas performance or Foreign Military Sales requirements are contemplated, those requirements need to be addressed in the AP/SAMP. See Item 1 of this Review Guide for requirements. See Also, Item 69.
- ◆ If a change occurs to the program that significantly affects the AP (e.g., scope, dollar value, contract type), the Contracting Officer shall submit a revised AP to the approval authority with a statement

summarizing the changes. The revised AP should reflect the current status of the action(s) described.  
AFFARS 5307.104(v)

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June 2003

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## CONTRACT REVIEW GUIDE

### Other than Full and Open Competition

**General:** Contracting officers shall promote and provide for full and open competition in soliciting offers and awarding Government contracts. If something other than full and open competition is contemplated, it must be justified, approved and documented.

#### Primary References:

- ◆ FAR 6.301, Policy
- ◆ FAR 6.302, Circumstances Permitting Other Than Full and Open Competition
- ◆ FAR 6.303-2, Content
- ◆ FAR 6.304, Approval of the Justification
- ◆ FAR 6.305, Availability of the Justification
- ◆ FAR 50.203, Limitations on Exercise of Authority
- ◆ DFARS 206.303-2, Content
- ◆ DFARS 206.304, Approval of the Justification
- ◆ AFFARS 5306.304, Approval of the Justification
- ◆ AFMCFARS 5306.303, Justifications
- ◆ Air Force Guide, Developing and Processing Justification and Approval (J&A) Documents [MS Word]

#### Secondary References:

- ◆ AFMC J&A Guide [MS Word]

#### Points To Remember:

◆ If the contract is not using full and open competition, does it fall within one of the seven (7) statutory authorities outlined in 41 USC § 253(c) and 10 USC § 2304(c), as implemented by FAR 6.3 and its supplements?

■ Only One Responsible Source and No Other Supplies or Services Will Satisfy Agency Requirements. 10 USC § 2304(c)(1); 41 USC § 253(c)(1); FAR 6.302-1; DFARS 206.302-1.

- Has adequate market research been conducted?

• If the reason is "substantial duplication of costs" or "unacceptable delays," the J&A must quantify the costs in terms of time or money and provide a basis for these estimates.

• If the J&A is based on the existence of proprietary impediments, the J&A must thoroughly document the actions taken to obtain missing data or to otherwise remove this impediment.

■ Unusual or Compelling Urgency. 10 USC § 2304(c)(2); 41 USC § 253(c)(2); FAR 6.302-2; DFARS 206.302-2

• May apply where unusual urgency precludes full and open competition and delay of the award would result in serious injury, financial or other, to the government. Be sure to quantify the nature of the serious

injury, estimate the costs caused by delay, or describe the conditions that may create a loss of life or injury.

- Urgency cannot arise from lack of procurement planning. Signals & Systems, Incorporated, B-288107, 2001 U.S. Comp. Gen. LEXIS 149; 2001 Comp. Gen. Proc. Dec. P168 (21 September 2001) [MS Word] [PDF]

- Award upheld where the record established an urgent need for the item because the agency had very few of the parts in stock, a large number of the parts were back-ordered, and a number of helicopters for which the part were ordered were not able to perform their missions. McGregor Manufacturing Corporation, B-285341, 2000 U.S. Comp. Gen. LEXIS 131 (18 August 2000) [MS Word] [PDF]

- Industrial Mobilization, Engineering, Developmental, or Research Capability, Expert Services. 10 USC § 2304(c)(3); 41 USC § 253(c)(3); FAR 6.302-3; DFARS 206.302-3

- Often used to authorize non-competitive renewal of contracts with Federally Funded Research and Development Centers (FFRDCs). Be sure to conduct adequate market research.

- International Agreement. 10 USC § 2304(c)(4); 41 USC § 253(c)(4); FAR 6.302-4; AFFARS 5306-302.4.

- Authorized or Required by Statute. 10 USC § 2304(c)(5); 41 USC § 253(c)(5); FAR 6.302-5; DFARS 206.302-5.

- National Security. 10 USC § 2304(c)(6); 41 USC § 253(c)(6); FAR 6.302-6.

- In this case, the J&A document would be a classified document.

- Public Interest. 10 USC § 2304(c)(7); 41 USC § 253(c)(7); FAR 6.302-7; DFARS 206.302-7.

- In this case, Congress must be notified in writing of this determination not less than 30 days prior to contract award. Reasons why full and open competition is not in the public interest must be given. Requires SECDEF approval.

- ◆ Does the use of other than full and open competition require written J&A?

- If so, has a J&A been written and does it contain the items listed in FAR 6.303-2? See the AFMC J&A Preparation Guide for guidance.

- Do the contents of the J&A agree with the contents of the synopses, the Statement of Work, the Acquisition Plan, and the contract?

- The contractual authority granted by the J&A is limited to that work described in the J&A: "new work" requires a new J&A.

- Is the J&A approved by the appropriate level of authority? FAR 6.304; DFARS 206.304; AFFARS 5306.304

- Does the J&A contain sufficient information to permit its approval as a stand-alone document? DFARS 206.303-2.

- ◆ Ensure that the J&A is approved prior to commencement of negotiations for a sole source contract or a contract resulting from an unsolicited proposal, or prior to award of any other contract except one that results

from an urgent and compelling need.

■ A written J&A is not required for International Agreements (FAR 6.302-4) for which AF is authorized to use an International Agreement Competitive Restriction. See AFFARS 5306.302-4.

◆ Remember that the rules apply not only to sole source but to any contract in which there is an explicit limitation on competitors.

◆ For international matters, ensure that the file contains an appropriate International Procurement Directive (IPD) from SAF/IA or AFMC.

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June 2003

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<b>SOLICITATION, OFFER AND AWARD</b>				1. THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 700)		RATING	PAGE OF PAGES 1 55	
CONTRACT NO.		3. SOLICITATION NO. DASG60-03-R-0010	4. TYPE OF SOLICITATION <input type="checkbox"/> SEALED BID (IFB) <input checked="" type="checkbox"/> NEGOTIATED (RFP)		5. DATE ISSUED 11 Jun 2003	6. REQUISITION/PURCHASE NO. DS1031		
7. ISSUED BY US ARMY SPACE & MISSILE DEFENSE COMMAND SMDC-CM-AK, TULLIE MILLER 256-955-3699 PO BOX 1500 HUNTSVILLE AL 35807-3801 TEL: 256-955-3699 FAX: 256-955-4240			CODE W31RPD	8. ADDRESS OFFER TO (If other than Item 7)  <b>See Item 7</b>		CODE  TEL: FAX:		
NOTE: In sealed bid solicitations "offer" and "offeror" mean "bid" and "bidder".								
<b>SOLICITATION</b>								
9. Sealed offers in original and <u>5</u> copies for furnishing the supplies or services in the Schedule will be received at the place specified in Item 8, or if handcarried, in the depository located in <u>106 Wynn Drive, Hvl, AL</u> until <u>03:00 PM</u> local time <u>25 Jul 2003</u> (Hour) (Date)								
CAUTION - LATE Submissions, Modifications, and Withdrawals: See Section L, Provision No. 52.214-7 or 52.215-1. All offers are subject to all terms and conditions contained in this solicitation.								
10. FOR INFORMATION CALL:		A. NAME TULLIE M. MILLER	B. TELEPHONE (Include area code) (NO COLLECT CALLS) 256-955-3699		C. E-MAIL ADDRESS tullie.miller@smdc.army.mil			
<b>11. TABLE OF CONTENTS</b>								
(X) SEC.	DESCRIPTION		PAGE(S)	(X) SEC.	DESCRIPTION		PAGE(S)	
<b>PART I - THE SCHEDULE</b>				<b>PART II - CONTRACT CLAUSES</b>				
X A	SOLICITATION/ CONTRACT FORM		1	X I	CONTRACT CLAUSES		17 - 21	
X B	SUPPLIES OR SERVICES AND PRICES/ COSTS		2 - 5	<b>PART III - LIST OF DOCUMENTS, EXHIBITS AND OTHER ATTACHMENTS</b>				
C	DESCRIPTION/ SPECS/ WORK STATEMENT			X J	LIST OF ATTACHMENTS		22	
D	PACKAGING AND MARKING			<b>PART IV - REPRESENTATIONS AND INSTRUCTIONS</b>				
X E	INSPECTION AND ACCEPTANCE		6	X K	REPRESENTATIONS, CERTIFICATIONS AND OTHER STATEMENTS OF OFFERORS		23 - 31	
X F	DELIVERIES OR PERFORMANCE		7	X L	INSTRS., CONDS., AND NOTICES TO OFFERORS		32 - 51	
X G	CONTRACT ADMINISTRATION DATA		8 - 11	X M	EVALUATION FACTORS FOR AWARD		52 - 55	
X H	SPECIAL CONTRACT REQUIREMENTS		12 - 16					
<b>OFFER (Must be fully completed by offeror)</b>								
NOTE: Item 12 does not apply if the solicitation includes the provisions at 52.214-16, Minimum Bid Acceptance Period.								
2. In compliance with the above, the undersigned agrees, if this offer is accepted within _____ calendar days (60 calendar days unless a different period is inserted by the offeror) from the date for receipt of offers specified above, to furnish any or all items upon which prices are offered at the price set opposite each item, delivered at the designated point(s), within the time specified in the schedule.								
13. DISCOUNT FOR PROMPT PAYMENT (See Section I, Clause No. 52.232-8)								
14. ACKNOWLEDGMENT OF AMENDMENTS (The offeror acknowledges receipt of amendments to the SOLICITATION for offerors and related documents numbered and dated):			AMENDMENT NO.	DATE	AMENDMENT NO.	DATE		
15A. NAME AND ADDRESS OF OFFEROR		CODE	FACILITY		16. NAME AND TITLE OF PERSON AUTHORIZED TO SIGN OFFER (Type or print)			
15B. TELEPHONE NO (Include area code)		15C. CHECK IF REMITTANCE ADDRESS IS DIFFERENT FROM ABOVE - ENTER SUCH ADDRESS IN SCHEDULE. <input type="checkbox"/>			17. SIGNATURE		18. OFFER DATE	
<b>AWARD (To be completed by Government)</b>								
19. ACCEPTED AS TO ITEMS NUMBERED			20. AMOUNT		21. ACCOUNTING AND APPROPRIATION			
22. AUTHORITY FOR USING OTHER THAN FULL AND OPEN COMPETITION: <input type="checkbox"/> 10 U.S.C. 2304(c) ( ) <input type="checkbox"/> 41 U.S.C. 253(c) ( )					23. SUBMIT INVOICES TO ADDRESS SHOWN IN (4 copies unless otherwise specified)		ITEM	
24. ADMINISTERED BY (If other than Item 7)			CODE	25. PAYMENT WILL BE MADE BY		CODE		
26. NAME OF CONTRACTING OFFICER (Type or print) TEL: EMAIL:				27. UNITED STATES OF AMERICA (Signature of Contracting Officer)			28. AWARD DATE	

**IMPORTANT - Award will be made on this Form, or on Standard Form 26, or by other authorized official written notice.**

Previous Edition is Unusable

33-134

STANDARD FORM 33 (REV. 9-97)  
Prescribed by GSA  
FAR (48 CFR) 53.214(c)



## Section B - Supplies or Services and Prices

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0001	Basic Effort CPFF Scope of Work SW-IM-06-03, dated 01 Apr 03, titled "Display Services," incorporated herein and attached as set forth in Part III, Section J, hereof. PURCHASE REQUEST NUMBER: DS1031	29,978	DPPH		

ESTIMATED COST

FIXED FEE

TOTAL EST COST + FEE

FOB: Destination

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0002	Data Items CPFF Contract Data Requirements List (CDRL), DD Form 1423, consisting of Line Items Nos *001 through *004, incorporated herein and attached as set forth in Section J. CLIN 0002 is applicable to all Option CLINs, if exercised. This CLIN is Not Separately Priced. PURCHASE REQUEST NUMBER: DS1031				

ESTIMATED COST

FIXED FEE

TOTAL EST COST + FEE

FOB: Destination

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0003		14,213	DPPH		
OPTION	Option I				

CPFF

Scope of Work SW-IM-06-03, dated 01 Apr 03, titled "Display Services," incorporated herein and attached as set forth in Part III, Section J, hereof.

PURCHASE REQUEST NUMBER: DS1031

ESTIMATED COST

FIXED FEE

TOTAL EST COST + FEE

FOB: Destination

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0004		13,749	DPPH		
OPTION	Option II				

CPFF

Scope of Work SW-IM-06-03, dated 01 Apr 03, titled "Display Services," incorporated herein and attached as set forth in Part III, Section J, hereof.

PURCHASE REQUEST NUMBER: DS1031

ESTIMATED COST

FIXED FEE

TOTAL EST COST + FEE

FOB: Destination

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0005 OPTION	Option III CPFF	13,295	DPPH		
Scope of Work SW-IM-06-03, dated 01 Apr 03, titled "Display Services," incorporated herein and attached as set forth in Part III, Section J, hereof.					
PURCHASE REQUEST NUMBER: DS1031					

ESTIMATED COST

FIXED FEE

TOTAL EST COST + FEE

FOB: Destination

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0006 OPTION	Option IV CPFF	12,848	DPPH		
Scope of Work SW-IM-06-03, dated 01 Apr 03, titled "Display Services," incorporated herein and attached as set forth in Part III, Section J, hereof.					
PURCHASE REQUEST NUMBER: DS1031					

ESTIMATED COST

FIXED FEE

TOTAL EST COST + FEE

FOB: Destination

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0007		12,408	DPPH		
OPTION	Option V				

CPFF

Scope of Work SW-IM-06-03, dated 01 Apr 03, titled "Display Services," incorporated herein and attached as set forth in Part III, Section J, hereof.

PURCHASE REQUEST NUMBER: DS1031

ESTIMATED COST

FIXED FEE

TOTAL EST COST + FEE

FOB: Destination

CLAUSES INCORPORATED BY FULL TEXT

LEVEL OF EFFORT:

a. In the performance of CLINs 0001/0002 and optional CLINs 0003, 0004, 0005, 0006, and 0007, if exercised, of this contract, the contractor shall provide direct productive person hours (DPPH) level of effort, as set forth below, within the time period as set forth in Section F hereof:

LABOR CATEGORY

DIRECT PRODUCTIVE  
PERSON HOURS  
LEVEL OF EFFORT

0001/0002 Basic	29,978
0003/0002 (Option I)	14,213
0004/0002 (Option II)	13,749
0005/0002 (Option III)	13,295
0006/0002 (Option IV)	12,848
0007/0002 (Option V)	12,408

b. DPPH are defined as prime contractor, consultant, and subcontractor actual direct labor hours exclusive of vacation, holiday, sick leave, and other absences.

c. In accordance with FAR 16.306(d)(2), entitlement to the total fixed fee is subject to the certification by the contractor to the Administrative Contracting Officer that he has exerted the total level of effort as stated in each voucher has provided the reports called for, and the effort performed and reports provided are considered satisfactory by the Government.

**Section E - Inspection and Acceptance**

**CLAUSES INCORPORATED BY REFERENCE**

**52.246-5            Inspection Of Services Cost-Reimbursement**

**APR 1984**

Section F - Deliveries or Performance

CLAUSES INCORPORATED BY REFERENCE

52.242-15

Stop-Work Order

AUG 1989

CLAUSES INCORPORATED BY FULL TEXT

PERIOD OF PERFORMANCE:

a. The contractor shall provide all level of effort, material/equipment, data, and reports required by CLINs 0001 and 0002 within twenty-four (24) months after the effective date of the contract.

b. The contractor shall provide all level of effort, material/equipment, data, and reports required by CLINs 0003 and 0002, if exercised, within twelve (12) months after the effective date of the option exercise.

c. The contractor shall provide all level of effort, material/equipment, data, and reports required by CLINs 0004 and 0002, if exercised, within twelve (12) months after the effective date of the option exercise.

d. The contractor shall provide all level of effort, material/equipment, data, and reports required by CLINs 0005 and 0002, if exercised, within twelve (12) months after the effective date of the option exercise.

e. The contractor shall provide all level of effort, material/equipment, data, and reports required by CLINs 0006 and 0002, if exercised, within twelve (12) months after the effective date of the option exercise.

f. The contractor shall provide all level of effort, material/equipment, data, and reports required by CLINs 0007 and 0002, if exercised, within twelve (12) months after the effective date of the option exercise.

DELIVERY OF DATA:

a. All data shall be delivered IAW FAR 52.247-34, F.O.B. Destination, as specified in Block 14 of DD Form 1423. The contractor shall furnish the Contracting Officer one (1) copy of the transmittal letters submitting data requirements to the Technical Monitor.

b. Acceptance by the Government of all items delivered hereunder shall be at destination.

## Section G - Contract Administration Data

## CLAUSES INCORPORATED BY REFERENCE

252.242-7000 Postaward Conference

DEC 1991

## CLAUSES INCORPORATED BY FULL TEXT

INVOICING AND VOUCHERING:

a. When authorized by the Defense Contract Audit Agency (DCAA) in accordance with DFARS 242.803(b)(i)(C), the contractor may submit interim vouchers directly to paying offices. Such authorization does not extend to the first and final vouchers. Submit first vouchers to the cognizant DCAA office. Final vouchers will be submitted to the ACO with a copy to DCAA.

b. Upon written notification to the contractor, DCAA may rescind the direct submission authority.

c. Should the contractor decline to submit interim vouchers directly to paying offices or if the contractor receives written notification that DCAA has rescinded the direct submission authority, public vouchers, together with any necessary supporting documentation, shall be submitted to the cognizant Defense Contract Audit Agency (DCAA) Office, prior to payment by the Finance and Accounting Office specified in Block 12, Page 1, Section A, of Standard Form 26.

d. The contractor shall identify on each public voucher: (1) the accounting classification reference number (ACRN) assigned to the accounting classification which pertains to the charges billed, e.g. "ACRN: AA;" (2) the contract line item number (CLIN) which pertains to the charges billed, and (3) the contract number. In addition, the Department of Defense requires that the Taxpayer Identification Number (TIN) be placed on all certified payment vouchers, including non-profit organizations, when submitting payment to the disbursing office. The only exception is foreign vendors, which will have the word "foreign" in the TIN field. Invoices will be returned to the vendor without payment if a TIN is not provided. Therefore also include in the address block, the Tax Identification Number, a point of contact, and the telephone number.

e. The contractor may include in provisional vouchers fixed fee based on the percentage of level of effort hours exerted to the total level of effort hours stipulated in Section B, subject to the withholding reserve of the contract clause titled "Fixed Fee."

f. A copy of each voucher, together with any necessary supporting documentation, shall also be submitted to the issuing office specified in Block 5, Page 1, Section A of Standard Form 26, concurrently with submission to the DCAA.

g. The Paying Office shall ensure that the voucher is disbursed for each ACRN as indicated on the voucher (or as specified herein).

CONTRACT ADMINISTRATION: Administration of this contract will be performed by the cognizant office as shown in Block 6, Page 1, Section A, of Standard Form 26. No changes, deviations, or waivers shall be effective without a modification of the contract executed by the Contracting Officer or his duly authorized representative authorizing such changes, deviations, or waivers.

**IDENTIFICATION OF CORRESPONDENCE:** All correspondence and data submitted by the contractor under this contract shall reference the contract number.

**CONTRACTING ACTIVITY REPRESENTATIVES:**

	Contractual Matters
NAME:	Tullie Miller
ORGANIZATION CODE:	SMDC-CM-AK
TELEPHONE NUMBERS:	(256) 955-3699
COMMERCIAL:	
DEFENSE SWITCHED NETWORK (DSN):	645-3699
EMAIL:	Tullie.miller@smdc.army.mil

**IMPLEMENTATION OF AND EXPLANATION OF THE RELATIONSHIP OF THE LIMITATION OF FUNDS (LOF) CLAUSE TO FEE OBLIGATIONS:** The amount of funds estimated to be required for full performance, including fee(s); the amount of funds allotted pursuant to the Contract Clause hereof entitled, Limitations of Funds; the amount of funds currently obligated for fee; and the estimated period of performance covered by the funds allotted are set forth below. Amounts obligated for fee are separate from and are not to be commingled with the amounts allotted for costs and are not available to the contractor to cover costs in excess of those allotted to the contract for cost.

a. CLINs 0001 and 0002: (Basic Effort)

- (1) Amount Required for Full Funding,  
Including Fee(s): \$ \_\_\_\_\_
- (2) Amount Allotted Under the LOF Clause  
for Payment of Costs: \$ \_\_\_\_\_
- (3) Amount Separately Obligated for  
Payment of Fee: \$ \_\_\_\_\_
- (4) Total Amount Allotted and Obligated: \$ \_\_\_\_\_
- (5) Net Amount Required for Full Funding: \$ \_\_\_\_\_
- (6) Estimated Period of Performance  
the Allotted Amount Will Cover: \$ \_\_\_\_\_

b. CLINs 0003 and 0002: (If exercised)

- (1) Amount Required for Full Funding,  
Including Fee(s): \$ \_\_\_\_\_
- (2) Amount Allotted Under the LOF Clause  
for Payment of Costs: \$ \_\_\_\_\_



- (3) Amount Separately Obligated for Payment of Fee: \$ \_\_\_\_\_
- (4) Total Amount Allotted and Obligated: \$ \_\_\_\_\_
- (5) Net Amount Required for Full Funding: \$ \_\_\_\_\_
- (6) Estimated Period of Performance the Allotted Amount Will Cover: \$ \_\_\_\_\_
- c. CLINs 0004 and 0002: (If exercised)
- (1) Amount Required for Full Funding, Including Fee(s): \$ \_\_\_\_\_
- (2) Amount Allotted Under the LOF Clause for Payment of Costs: \$ \_\_\_\_\_
- (3) Amount Separately Obligated for Payment of Fee: \$ \_\_\_\_\_
- (4) Total Amount Allotted and Obligated: \$ \_\_\_\_\_
- (5) Net Amount Required for Full Funding: \$ \_\_\_\_\_
- (6) Estimated Period of Performance the Allotted Amount Will Cover: \$ \_\_\_\_\_
- d. CLINs 0005 and 0002: (If exercised)
- (1) Amount Required for Full Funding, Including Fee(s): \$ \_\_\_\_\_
- (2) Amount Allotted Under the LOF Clause for Payment of Costs: \$ \_\_\_\_\_
- (3) Amount Separately Obligated for Payment of Fee: \$ \_\_\_\_\_
- (4) Total Amount Allotted and Obligated: \$ \_\_\_\_\_
- (5) Net Amount Required for Full Funding: \$ \_\_\_\_\_
- (6) Estimated Period of Performance the Allotted Amount Will Cover: \$ \_\_\_\_\_
- e. CLINs 0006 and 0002: (If exercised)
- (1) Amount Required for Full Funding, Including Fee(s): \$ \_\_\_\_\_
- (2) Amount Allotted Under the LOF Clause

for Payment of Costs:

\$ \_\_\_\_\_

- (3) Amount Separately Obligated for  
Payment of Fee:

\$ \_\_\_\_\_

- (4) Total Amount Allotted and Obligated:

\$ \_\_\_\_\_

- (5) Net Amount Required for Full Funding:

\$ \_\_\_\_\_

- (6) Estimated Period of Performance  
the Allotted Amount Will Cover:

\$ \_\_\_\_\_

f. CLINs 0007 and 0002: (If exercised)

- (1) Amount Required for Full Funding,  
Including Fee(s):

\$ \_\_\_\_\_

- (2) Amount Allotted Under the LOF Clause  
for Payment of Costs:

\$ \_\_\_\_\_

- (3) Amount Separately Obligated for  
Payment of Fee:

\$ \_\_\_\_\_

- (4) Total Amount Allotted and Obligated:

\$ \_\_\_\_\_

- (5) Net Amount Required for Full Funding:

\$ \_\_\_\_\_

- (6) Estimated Period of Performance  
the Allotted Amount Will Cover:

\$ \_\_\_\_\_

## Section H - Special Contract Requirements

OPTIONS:

Option CLINs 0003/0002 (Option I), CLINs 0004/0002 (Option II), CLINs 0005/0002 (Option III), CLINs 0006/0002 (Option IV), and CLINs 0007/0002 (Option V) may be exercised by the Contracting Officer by issuance of a unilateral modification to this contract. The parties agree that the option shall be considered to have been exercised, for the purpose of the contract, at the time the Government issues the modification. The contractor shall incur no costs, chargeable to the option until the contracting officer has provided written notification that the option has been exercised. Option CLINs 0003/0002 if exercised, may be exercised at any time during the period of performance of CLINs 0001 and 0002. Option CLINs 0004/0002 if exercised, may be exercised at any time during the period of performance of CLINs 0003 and 0002. Option CLINs 0005/0002 if exercised, may be exercised at any time during the period of performance of CLINs 0004 and 0002. Option CLINs 0006/0002 if exercised, may be exercised at any time during the period of performance of CLINs 0005 and 0002. Option CLINs 0007/0002 if exercised, may be exercised at any time during the period of performance of CLINs 0006 and 0002.

The Government may exercise the Option CLINs in multiple increments until the total amount of DPPH specified for each option set have been ordered by such option exercise. All effort required shall be performed within the specified period of performance and the option shall be incorporated at the established rate specified below. For purpose of the option exercise under the option CLINs, the composite rate per hour that will be utilized is as follows:

	<u>Rate</u>
CLINs 0003/0002	To Be Determined
CLINs 0004/0002	
CLINs 0005/0002	
CLINs 0006/0002	
CLINs 0007/0002	

The exercise of any portion of the option must be accomplished in accordance with the requirements of this clause. All contract terms and conditions apply during the option periods (if exercised).

WAGE DETERMINATION

Service Contract Act Wage Determination No: 1994-2007, Rev 23, Area: Alabama Counties of Colbert, Franklin, Jackson, Lauderdale, Lawrence, Limestone, Madison, Marion, Marshall, Morgan, and Winston, dated 28 May 02, is incorporated herein as set forth in Part III, Section J, hereof.

## CLAUSES INCORPORATED BY FULL TEXT

PUBLIC RELEASE OF INFORMATION:

a. In accordance with DFARS 252.204-7000, Disclosure of Information, The Contractor shall not release to anyone outside the Contractor's organization any unclassified information, regardless of medium (e.g., film, tape, document), pertaining to any part of this contract or any program related to this contract, unless the Contractor has written approval or the information is otherwise in the public domain before the date of release.

b. Requests for approval shall identify the specific information to be released, the medium to be used, and the purpose for the release. The Contractor shall submit its request to the Technical Monitor noted in the contract, Section H,

at least 45 days before the proposed date for release. All material to be cleared shall be sent by certified mail/return receipt requested to:

U.S. Army Space and Missile Defense Command  
ATTN: Insert Technical Office POC  
P. O. Box 1500  
Huntsville, AL 35807-3801

c. The Technical Monitor shall process the request in accordance with SMDC form 614-R.

d. If there is no response within 30 days, the Contractor shall resubmit the request to:

U.S. Army Space and Missile Defense Command  
ATTN: SMDC-PA  
P. O. Box 1500  
Huntsville, AL 35807-3801

e. The Contractor agrees to include a similar requirement in each subcontract under this contract. Subcontractors shall submit requests for authorization to release through the prime contractor.

#### DISTRIBUTION CONTROL OF TECHNICAL INFORMATION:

a. The following terms applicable to this clause are defined as follows:

(1) Technical Document. Any recorded information that conveys scientific and technical information or technical data.

(2) Scientific and Technical Information. Communicable knowledge or information resulting from or pertaining to conducting and managing a scientific or engineering research effort.

(3) Technical Data. Recorded information related to experimental, developmental, or engineering works that can be used to define an engineering or manufacturing process or to design, procure, produce, support, maintain, operate, repair, or overhaul material. The data may be graphic or pictorial delineations in media such as drawings or photographs, text in specifications or related performance or design type documents, or computer printouts. Examples of technical data include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog-item identifications, and related information and computer software documentation.

b. Except as may otherwise be set forth in the Contract Data Requirements List (CDRL), DD Form 1423, (i) the distribution of any technical document prepared under this contract, in any stage of development or completion, is prohibited without the approval of the Contracting Officer and (ii) all technical documents prepared under this contract shall initially be marked with the following distribution statement, warning, and destruction notice:

(1) DISTRIBUTION STATEMENT F - Further dissemination only as directed by SMDC-IM-PA or higher DOD authority.

(2) WARNING - This document contains technical data whose export is restricted by the Arms Export Control Act (Title 22, U.S.C., Sec 2751 et seq.) or the Export Administration Act of 1979, as amended, Title 50, U.S.C., app 2401 et seq. Violation of these export laws are subject to severe criminal penalties. Disseminate in accordance with provisions of DOD Directive 5230.25.

(3) **DESTRUCTION NOTICE** - For classified documents, follow the procedures in DOD 5220.22-M, National Industrial Security Program Operating Manual (NISPOM), Chapter 5, Section 7, or DOD 5200.1-R, Information Security Program Regulation, Chapter IX. For unclassified, limited documents, destroy by any method that will prevent disclosure of contents or reconstruction of the document.

c. As a part of the review of preliminary or working draft technical documents, the Government will determine if a distribution statement less restrictive than the statement specified above would provide adequate protection. If so, the Government's approval/comments will provide specific instructions on the distribution statement to be marked on the final technical documents before primary distribution.

#### TECHNICAL COGNIZANCE AND TECHNICAL DIRECTION:

a. The U.S. Army Space and Missile Defense Command is the cognizant Government technical organization for this contract and will provide technical direction as defined herein. Technical direction shall be exercised by the following Project Engineer:

Name	Office symbol	Phone Number
------	---------------	--------------

TO BE DETERMINED

b. Technical direction, as defined in this clause is the process by which the progress of the contractor's technical efforts are reviewed and evaluated and guidance for the continuation of the effort is provided by the Government. It also includes technical discussions and, to the extent required and specified elsewhere in this contract, defining interfaces between contractors; approving test plans; approving preliminary and critical design reviews; participating in meetings; providing technical and management information; and responding to request for research and development planning data on all matters pertaining to this contract. The contractor agrees to accept technical direction only in the form and procedure set forth herein below.

c. Except for routine discussions having no impact on contractor performance, any and all technical direction described in paragraph b. above shall only be authorized and binding on the contractor when issued in writing and signed by a Government official designated in a. above. The Technical Direction shall not effect or result in a change within the meaning of the "CHANGES" clause, or any other change in the Scope of Work, price, schedule, or the level of effort required by the contract. Such changes must be executed by the Contracting Officer as a Modification-Change Order, or as a Modification-Supplemental Agreement, as appropriate. It is emphasized that such changes are outside the authority of the Government officials designated in a. above who are not authorized to issue any directions which authorize the contractor to exceed or perform less than the contract requirements. Notwithstanding any provision to the contrary in any Technical Directive, the estimated cost of this contract, and, if this contract is incrementally funded, the amount of funds allotted, shall not be increased or deemed to be increased by issuance thereof.

#### H-. KEY PERSONNEL:

a. The key personnel listed in paragraph b below are considered to be critical to the successful performance of this contract. Prior to replacing these key personnel, the contractor shall obtain written consent of the contracting officer. In order to obtain such consent, the contractor must provide advance notice of the proposed changes and must demonstrate that the qualifications of the proposed substitute personnel are generally equivalent to or better than the qualifications of the personnel being replaced.

b. Key Personnel List:

<u>NAME</u>	<u>POSITION</u>
TO BE DETERMINED	
_____	
_____	
_____	
_____	

(This list shall be negotiated by the parties. Personnel identified as key individuals in the offeror's proposal shall be candidates for this list, however, it is not intended that all such proposed key individuals must be listed in this clause.)

CONTRACT SECURITY CLASSIFICATION:

a. This contract is unclassified and does not contain security requirements or a Contract Security Classification Specification, DD Form 254.

b. In accordance with restrictions required by Executive Order 12470, the Arms Export Control Act (Title 22, USC) (Sec 275), the International Traffic in Arms Regulation (ITAR), or DoD Directive 5230.25, Withholding of Unclassified Technical Data from Public Disclosure, no foreign nationals will be permitted to work on a contract without the express permission of the Contracting Officer.

c. Should the government determine that the technology has developed to a point where the information warrants protection under Executive Order 12958, Classified National Security Information, a DD Form 254 and an approved classification guide will be issued to the contractor and appropriate steps will be taken under the contract to protect the material.

MINIMUM INSURANCE LIABILITY: Pursuant to the requirements of the contract clause 52.228-7, "Insurance – Liability to Third Persons," the contractor shall obtain and maintain at least the following kinds of insurance and minimum liability coverage during any period of contract performance:

a. Workman's Compensation and Employers' Liability Insurance: Compliance with applicable workmen's compensation and occupational disease statutes is required. Employers' liability coverage in the minimum amount of \$100,000 is required.

b. General Liability Insurance: Bodily injury liability insurance, in the minimum limits of \$500,000 per occurrence, is required on the comprehensive form of policy; however, property damage liability insurance is not required.

c. Automobile Liability Insurance: This insurance is required on the comprehensive form of policy and shall provide bodily injury liability and property damage liability covering the operation of all automobiles used in connection with the performance of the contract. At least the minimum limits of \$200,000 per person and \$500,000 per occurrence for bodily injury and \$20,000 per occurrence for property damage is required.

PATENTS - REPORTING OF SUBJECT INVENTIONS:

a. The interim and final invention reports shall be submitted on DD Form 882, Report of Inventions and Subcontracts, see <http://www.smdc.army.mil/Contracts/Contracts.html> and click on the Special Announcements link to see the instructions. In accordance with DFARS 252.227-7039 and FAR 52.227-11, interim reports shall be furnished every twelve (12) months and final reports shall be furnished within three (3) months after completion of the contracted work. In accordance with FAR 27.305-3(e), when a contractor fails to disclose a subject invention the applicable withholding of payments provision may be invoked.

b. The contractor shall include the clause at DFARS 252.227-7039 in all subcontracts with small businesses and non profit organizations, regardless of tier, for experimental, developmental, or research work.

c. The prime contractor shall account for the interim and final invention reports submitted by the subcontractor.

YEAR 2000 COMPLIANCE:

The Contractor shall ensure products provided under this contract, to include hardware, software, firmware, and middleware, whether acting alone or combined as a system, are Year 2000 compliant as defined in FAR Part 39.

## Section I - Contract Clauses

## CLAUSES INCORPORATED BY REFERENCE

52.202-1	Definitions	DEC 2001
52.203-3	Gratuities	APR 1984
52.203-5	Covenant Against Contingent Fees	APR 1984
52.203-6	Restrictions On Subcontractor Sales To The Government	JUL 1995
52.203-7	Anti-Kickback Procedures	JUL 1995
52.203-8	Cancellation, Rescission, and Recovery of Funds for Illegal or Improper Activity	JAN 1997
52.203-10	Price Or Fee Adjustment For Illegal Or Improper Activity	JAN 1997
52.203-12	Limitation On Payments To Influence Certain Federal Transactions	JUN 1997
52.204-4	Printed or Copied Double-Sided on Recycled Paper	AUG 2000
52.209-6	Protecting the Government's Interest When Subcontracting With Contractors Debarred, Suspended, or Proposed for Debarment	JUL 1995
52.211-15	Defense Priority And Allocation Requirements	SEP 1990
52.215-2	Audit and Records--Negotiation	JUN 1999
52.215-8	Order of Precedence--Uniform Contract Format	OCT 1997
52.215-10	Price Reduction for Defective Cost or Pricing Data	OCT 1997
52.215-12	Subcontractor Cost or Pricing Data	OCT 1997
52.215-13	Subcontractor Cost or Pricing Data--Modifications	OCT 1997
52.215-14	Integrity of Unit Prices	OCT 1997
52.215-15	Pension Adjustments and Asset Reversions	DEC 1998
52.215-16	Facilities Capital Cost of Money	OCT 1997
52.215-17	Waiver of Facilities Capital Cost of Money	OCT 1997
52.215-18	Reversion or Adjustment of Plans for Postretirement Benefits (PRB) Other than Pensions	OCT 1997
52.215-20 Alt IV	Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data (Oct 1997) - Alternate IV	OCT 1997
52.216-7	Allowable Cost And Payment	DEC 2002
52.216-8	Fixed Fee	MAR 1997
52.217-8	Option To Extend Services	NOV 1999
52.217-9	Option To Extend The Term Of The Contract	MAR 2000
52.219-6	Notice Of Total Small Business Set-Aside	JUL 1996
52.219-8	Utilization of Small Business Concerns	OCT 2000
52.219-14	Limitations On Subcontracting	DEC 1996
52.222-3	Convict Labor	AUG 1996
52.222-21	Prohibition Of Segregated Facilities	FEB 1999
52.222-26	Equal Opportunity	APR 2002
52.222-35	Equal Opportunity For Special Disabled Veterans, Veterans of the Vietnam Era and Other Eligible Veterans	DEC 2001
52.222-36	Affirmative Action For Workers With Disabilities	JUN 1998
52.222-37	Employment Reports On Special Disabled Veterans, Veterans Of The Vietnam Era, and Other Eligible Veterans	DEC 2001
52.222-41	Service Contract Act Of 1965, As Amended	MAY 1989
52.223-6	Drug Free Workplace	MAY 2001
52.223-14	Toxic Chemical Release Reporting	OCT 2000
52.225-13	Restrictions on Certain Foreign Purchases	JUL 2000
52.226-1	Utilization Of Indian Organizations And Indian-Owned Economic Enterprises	JUN 2000



52.227-2	Notice And Assistance Regarding Patent And Copyright Infringement	AUG 1996
52.228-7	Insurance--Liability To Third Persons	MAR 1996
52.232-9	Limitation On Withholding Of Payments	APR 1984
52.232-17	Interest	JUN 1996
52.232-22	Limitation Of Funds	APR 1984
52.232-23	Assignment Of Claims	JAN 1986
52.232-25	Prompt Payment	FEB 2002
52.232-33	Payment by Electronic Funds Transfer--Central Contractor Registration	MAY 1999
52.233-1	Disputes	JUL 2002
52.233-3 Alt I	Protest After Award (Aug 1996) - Alternate I	JUN 1985
52.237-3	Continuity Of Services	JAN 1991
52.242-1	Notice of Intent to Disallow Costs	APR 1984
52.242-3	Penalties for Unallowable Costs	MAY 2001
52.242-13	Bankruptcy	JUL 1995
52.243-2 Alt II	Changes--Cost Reimbursement (Aug 1987) - Alternate II	APR 1984
52.243-3	Changes--Time-And-Material Or Labor-Hours	SEP 2000
52.244-2	Subcontracts	AUG 1998
52.244-5	Competition In Subcontracting	DEC 1996
52.245-5	Government Property (Cost-Reimbursement Time-And-Materials, Or Labor Hour Contracts)	JAN 1986
52.246-25	Limitation Of Liability--Services	FEB 1997
52.247-1	Commercial Bill Of Lading Notations	APR 1984
52.249-6	Termination (Cost Reimbursement)	SEP 1996
52.249-14	Excusable Delays	APR 1984
252.203-7001	Prohibition On Persons Convicted of Fraud or Other Defense-Contract-Related Felonies	MAR 1999
252.203-7002	Display Of DOD Hotline Poster	DEC 1991
252.204-7000	Disclosure Of Information	DEC 1991
252.204-7003	Control Of Government Personnel Work Product	APR 1992
252.204-7004	Required Central Contractor Registration	NOV 2001
252.205-7000	Provisions Of Information To Cooperative Agreement Holders	DEC 1991
252.209-7000	Acquisition From Subcontractors Subject To On-Site Inspection Under The Intermediate Range Nuclear Forces (INF) Treaty	NOV 1995
252.212-7000	Offeror Representations and Certifications- Commercial Items	NOV 1995
252.215-7002	Cost Estimating System Requirements	OCT 1998
252.223-7004	Drug Free Work Force	SEP 1988
252.225-7012	Preference For Certain Domestic Commodities	FEB 2003
252.225-7016	Restriction On Acquisition Of Ball and Roller Bearings	APR 2003
252.226-7001	Utilization of Indian Organizations and Indian-Owned Economic Enterprises--DoD Contracts	SEP 2001
252.227-7034	Patents--Subcontracts	APR 1984
252.227-7039	Patents--Reporting Of Subject Inventions	APR 1990
252.231-7000	Supplemental Cost Principles	DEC 1991
252.232-7009	Mandatory Payment by Governmentwide Commercial Purchase Card	JUL 2000
252.244-7000	Subcontracts for Commercial Items and Commercial Components (DoD Contracts)	MAR 2000
252.245-7001	Reports Of Government Property	MAY 1994
252.246-7000	Material Inspection And Receiving Report	MAR 2003

252.247-7023 Alt III Transportation of Supplies by Sea (May 2002) Alternate III MAY 2002  
 252.251-7000 Ordering From Government Supply Sources OCT 2002

CLAUSES INCORPORATED BY FULL TEXT

52.215-19 NOTIFICATION OF OWNERSHIP CHANGES (OCT 1997)

(a) The Contractor shall make the following notifications in writing:

(1) When the Contractor becomes aware that a change in its ownership has occurred, or is certain to occur, that could result in changes in the valuation of its capitalized assets in the accounting records, the Contractor shall notify the Administrative Contracting Officer (ACO) within 30 days.

(2) The Contractor shall also notify the ACO within 30 days whenever changes to asset valuations or any other cost changes have occurred or are certain to occur as a result of a change in ownership.

(b) The Contractor shall--

(1) Maintain current, accurate, and complete inventory records of assets and their costs;

(2) Provide the ACO or designated representative ready access to the records upon request;

(3) Ensure that all individual and grouped assets, their capitalized values, accumulated depreciation or amortization, and remaining useful lives are identified accurately before and after each of the Contractor's ownership changes; and

(4) Retain and continue to maintain depreciation and amortization schedules based on the asset records maintained before each Contractor ownership change.

The Contractor shall include the substance of this clause in all subcontracts under this contract that meet the applicability requirement of FAR 15.408(k).

(End of clause)

52.222-42 STATEMENT OF EQUIVALENT RATES FOR FEDERAL HIRES (MAY 1989)

In compliance with the Service Contract Act of 1965, as amended, and the regulations of the Secretary of Labor (29 CFR Part 4), this clause identifies the classes of service employees expected to be employed under the contract and states the wages and fringe benefits payable to each if they were employed by the contracting agency subject to the provisions of 5 U.S.C. 5341 or 5332.

THIS STATEMENT IS FOR INFORMATION ONLY: IT IS NOT A WAGE DETERMINATION

Employee Class

Monetary Wage-Fringe Benefits

(End of clause)

52.244-6 SUBCONTRACTS FOR COMMERCIAL ITEMS (MAY 2002)

(a) Definitions.

"Commercial item", has the meaning contained in the clause at 52.202-1, Definitions.

"Subcontract", includes a transfer of commercial items between divisions, subsidiaries, or affiliates of the Contractor or subcontractor at any tier.

(b) To the maximum extent practicable, the Contractor shall incorporate, and require its subcontractors at all tiers to incorporate, commercial items or nondevelopmental items as components of items to be supplied under this contract.

(c) (1) The Contractor shall insert the following clauses in subcontracts for commercial items:

(i) 52.219-8, Utilization of Small Business Concerns (OCT 2000) (15 U.S.C. 637(d)(2) and (3)), in all subcontracts that offer further subcontracting opportunities. If the subcontract (except subcontracts to small business concerns) exceeds \$500,000 (\$1,000,000 for construction of any public facility), the subcontractor must include 52.219-8 in lower tier subcontracts that offer subcontracting opportunities.

(ii) 52.222-26, Equal Opportunity (Apr 2002) (E.O. 11246).

(iii) 52.222-35, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era and Other Eligible Veterans (DEC 2001) (38 U.S.C. 4212(a)).

(iv) 52.222-36, Affirmative Action for Workers with Disabilities (JUN 1998) (29 U.S.C. 793).

(v) 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels (JUN 2000) (46 U.S.C. Appx 1241) (flowdown not required for subcontracts awarded beginning May 1, 1996).

(2) While not required, the Contractor may flow down to subcontracts for commercial items a minimal number of additional clauses necessary to satisfy its contractual obligations.

(d) The Contractor shall include the terms of this clause, including this paragraph (d), in subcontracts awarded under this contract.

(End of clause)

52.252-2 CLAUSES INCORPORATED BY REFERENCE (FEB 1998)

This contract incorporates one or more clauses by reference, with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available. Also, the full text of a clause may be accessed electronically at this/these address(es):

[www.arnet.gov](http://www.arnet.gov)

(End of clause)

52.252-6 AUTHORIZED DEVIATIONS IN CLAUSES (APR 1984)

(a) The use in this solicitation or contract of any Federal Acquisition Regulation (48 CFR Chapter 1) clause with an authorized deviation is indicated by the addition of "(DEVIATION)" after the date of the clause.

(b) The use in this solicitation or contract of any insert regulation name (48 CFR       ) clause with an authorized deviation is indicated by the addition of "(DEVIATION)" after the name of the regulation.

(End of clause)

## Section J - List of Documents, Exhibits and Other Attachments

## CLAUSES INCORPORATED BY FULL TEXT

PART III - LIST OF DOCUMENTS, EXHIBITS, AND OTHER ATTACHMENTSSECTION J - LIST OF ATTACHMENTS

<u>TITLE</u>	<u>DATE</u>	<u>#OF PAGES</u>
Information to Offerors or Quotes (DD Form 1707)	N/A	1
Contract Facilities Capital Cost of Money	N/A	1
Disclosure of Lobbying Activities (SF-LLL)	N/A	1
Scope of Work, SW-IM-06-03, Display Services	01 Apr 03	13
Contract Data Requirement List (DD Form 1443) Exhibit A with Distribution and Data Items	11 Mar 03	8
Wage Determination No: 1994-2007 Rev. 23	28 May 02	18
Past Performance Evaluation Forms (Note in Section M that this form will be used as a guide to evaluate past performance.)	N/A	7
Past Performance Evaluation Letter	N/A	1
The Section K Representations, Certifications, and other Statements of offeror submitted by contractor in response to RFP DASG60-03-R-0010 will be incorporated Into the resultant contract by reference.		

## Section K - Representations, Certifications and Other Statements of Offerors

DEVIATION FOR FAR 52.203-11

Deviation CD 90-00001 applies to FAR 52.203-11; see the following website:

<http://www.acq.osd.mil/dp/dars/classdev.html>

## CLAUSES INCORPORATED BY REFERENCE

52.203-11	Certification And Disclosure Regarding Payments To Influence Certain Federal Transactions	APR 1991
52.222-38	Compliance With Veterans' Employment Reporting Requirements	DEC 2001

## CLAUSES INCORPORATED BY FULL TEXT

## 52.204-3 TAXPAYER IDENTIFICATION (OCT 1998)

## (a) Definitions.

"Common parent," as used in this provision, means that corporate entity that owns or controls an affiliated group of corporations that files its Federal income tax returns on a consolidated basis, and of which the offeror is a member.

"Taxpayer Identification Number (TIN)," as used in this provision, means the number required by the Internal Revenue Service (IRS) to be used by the offeror in reporting income tax and other returns. The TIN may be either a Social Security Number or an Employer Identification Number.

(b) All offerors must submit the information required in paragraphs (d) through (f) of this provision to comply with debt collection requirements of 31 U.S.C. 7701(c) and 3325(d), reporting requirements of 26 U.S.C. 6041, 6041A, and 6050M, and implementing regulations issued by the IRS. If the resulting contract is subject to the payment reporting requirements described in Federal Acquisition Regulation (FAR) 4.904, the failure or refusal by the offeror to furnish the information may result in a 31 percent reduction of payments otherwise due under the contract.

(c) The TIN may be used by the Government to collect and report on any delinquent amounts arising out of the offeror's relationship with the Government (31 U.S.C. 7701(c)(3)). If the resulting contract is subject to the payment reporting requirements described in FAR 4.904, the TIN provided hereunder may be matched with IRS records to verify the accuracy of the offeror's TIN.

## (d) Taxpayer Identification Number (TIN).

\_\_\_ TIN: \_\_\_\_\_

\_\_\_ TIN has been applied for.

\_\_\_ TIN is not required because:

☐ Offeror is a nonresident alien, foreign corporation, or foreign partnership that does not have income effectively connected with the conduct of a trade or business in the United States and does not have an office or place of business or a fiscal paying agent in the United States;

☐ Offeror is an agency or instrumentality of a foreign government;

☐ Offeror is an agency or instrumentality of the Federal Government.

(e) Type of organization.

☐ Sole proprietorship;

☐ Partnership;

☐ Corporate entity (not tax-exempt);

☐ Corporate entity (tax-exempt);

☐ Government entity (Federal, State, or local);

☐ Foreign government;

☐ International organization per 26 CFR 1.6049-4;

☐ Other \_\_\_\_\_

(f) Common parent.

☐ Offeror is not owned or controlled by a common parent as defined in paragraph (a) of this provision.

☐ Name and TIN of common parent:

Name \_\_\_\_\_

TIN \_\_\_\_\_

(End of provision)

**52.209-5 CERTIFICATION REGARDING DEBARMENT, SUSPENSION, PROPOSED DEBARMENT, AND OTHER RESPONSIBILITY MATTERS (DEC 2001)**

(a)(1) The Offeror certifies, to the best of its knowledge and belief, that--

(i) The Offeror and/or any of its Principals--

(A) Are ( ) are not ( ) presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any Federal agency;

(B) Have ( ) have not ( ), within a three-year period preceding this offer, been convicted of or had a civil judgment rendered against them for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, state, or local) contract or subcontract; violation of Federal or state antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property; and

(C) Are ( ) are not ( ) presently indicted for, or otherwise criminally or civilly charged by a governmental entity with, commission of any of the offenses enumerated in subdivision (a)(1)(i)(B) of this provision.

(ii) The Offeror has ( ) has not ( ), within a three-year period preceding this offer, had one or more contracts terminated for default by any Federal agency.

(2) "Principals," for the purposes of this certification, means officers; directors; owners; partners; and, persons having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division, or business segment, and similar positions).

THIS CERTIFICATION CONCERNS A MATTER WITHIN THE JURISDICTION OF AN AGENCY OF THE UNITED STATES AND THE MAKING OF A FALSE, FICTITIOUS, OR FRAUDULENT CERTIFICATION MAY RENDER THE MAKER SUBJECT TO PROSECUTION UNDER SECTION 1001, TITLE 18, UNITED STATES CODE.

(b) The Offeror shall provide immediate written notice to the Contracting Officer if, at any time prior to contract award, the Offeror learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

(c) A certification that any of the items in paragraph (a) of this provision exists will not necessarily result in withholding of an award under this solicitation. However, the certification will be considered in connection with a determination of the Offeror's responsibility. Failure of the Offeror to furnish a certification or provide such additional information as requested by the Contracting Officer may render the Offeror nonresponsible.

(d) Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render, in good faith, the certification required by paragraph (a) of this provision. The knowledge and information of an Offeror is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

(e) The certification in paragraph (a) of this provision is a material representation of fact upon which reliance was placed when making award. If it is later determined that the Offeror knowingly rendered an erroneous certification, in addition to other remedies available to the Government, the Contracting Officer may terminate the contract resulting from this solicitation for default.

(End of provision)

#### 52.215-6 PLACE OF PERFORMANCE (OCT 1997)

(a) The offeror or respondent, in the performance of any contract resulting from this solicitation, ( ) intends, ( ) does not intend (check applicable block) to use one or more plants or facilities located at a different address from the address of the offeror or respondent as indicated in this proposal or response to request for information.

(b) If the offeror or respondent checks "intends" in paragraph (a) of this provision, it shall insert in the following spaces the required information:

Place of Performance(Street Address, City, State, County, Zip Code)	Name and Address of Owner and Operator of the Plant or Facility if Other Than Offeror or Respondent



(End of provision)

#### 52.219-1 SMALL BUSINESS PROGRAM REPRESENTATIONS (APR 2002)

(a)(1) The North American Industry Classification System (NAICS) code for this acquisition is (541430).

(2) The small business size standard is 6 Million Dollars.

(3) The small business size standard for a concern which submits an offer in its own name, other than on a construction or service contract, but which proposes to furnish a product which it did not itself manufacture, is 500 employees.

(b) Representations. (1) The offeror represents as part of its offer that it ( ) is, ( ) is not a small business concern.

(2) (Complete only if the offeror represented itself as a small business concern in paragraph (b)(1) of this provision.) The offeror represents, for general statistical purposes, that it ( ) is, ( ) is not a small disadvantaged business concern as defined in 13 CFR 124.1002.

(3) (Complete only if the offeror represented itself as a small business concern in paragraph (b)(1) of this provision.) The offeror represents as part of its offer that it ( ) is, ( ) is not a women-owned small business concern.

(4) (Complete only if the offeror represented itself as a small business concern in paragraph (b)(1) of this provision.) The offeror represents as part of its offer that it ( ) is, ( ) is not a veteran-owned small business concern.

(5) (Complete only if the offeror represented itself as a veteran-owned small business concern in paragraph (b)(4) of this provision.) The offeror represents as part of its offer that it ( ) is, ( ) is not a service-disabled veteran-owned small business concern.

(6) (Complete only if the offeror represented itself as a small business concern in paragraph (b)(1) of this provision.) The offeror represents, as part of its offer, that--

(i) It ( ) is, ( ) is not a HUBZone small business concern listed, on the date of this representation, on the List of Qualified HUBZone Small Business Concerns maintained by the Small Business Administration, and no material change in ownership and control, principal office, or HUBZone employee percentage has occurred since it was certified by the Small Business Administration in accordance with 13 CFR part 126; and

(ii) It ( ) is, ( ) is not a joint venture that complies with the requirements of 13 CFR part 126, and the representation in paragraph (b)(6)(i) of this provision is accurate for the HUBZone small business concern or concerns that are participating in the joint venture. (The offeror shall enter the name or names of the HUBZone small business concern or concerns that are participating in the joint venture: \_\_\_\_\_.) Each HUBZone small business concern participating in the joint venture shall submit a separate signed copy of the HUBZone representation.

(c) Definitions. As used in this provision--

Service-disabled veteran-owned small business concern--

(1) Means a small business concern--

(i) Not less than 51 percent of which is owned by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled veterans; and

(ii) The management and daily business operations of which are controlled by one or more service-disabled veterans or, in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran.

(2) Service-disabled veteran means a veteran, as defined in 38 U.S.C. 101(2), with a disability that is service-connected, as defined in 38 U.S.C. 101(16).

"Small business concern," means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria in 13 CFR Part 121 and the size standard in paragraph (a) of this provision.

Veteran-owned small business concern means a small business concern--

(1) Not less than 51 percent of which is owned by one or more veterans (as defined at 38 U.S.C. 101(2)) or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more veterans; and

(2) The management and daily business operations of which are controlled by one or more veterans.

"Women-owned small business concern," means a small business concern --

(1) That is at least 51 percent owned by one or more women; in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women; and

(2) Whose management and daily business operations are controlled by one or more women.

(d) Notice.

(1) If this solicitation is for supplies and has been set aside, in whole or in part, for small business concerns, then the clause in this solicitation providing notice of the set-aside contains restrictions on the source of the end items to be furnished.

(2) Under 15 U.S.C. 645(d), any person who misrepresents a firm's status as a small, HUBZone small, small disadvantaged, or women-owned small business concern in order to obtain a contract to be awarded under the preference programs established pursuant to section 8(a), 8(d), 9, or 15 of the Small Business Act or any other provision of Federal law that specifically references section 8(d) for a definition of program eligibility, shall--

(i) Be punished by imposition of fine, imprisonment, or both;

(ii) Be subject to administrative remedies, including suspension and debarment; and

(iii) Be ineligible for participation in programs conducted under the authority of the Act.

(End of provision)

## 52.222-22 PREVIOUS CONTRACTS AND COMPLIANCE REPORTS (FEB 1999)

The offeror represents that --

(a) ( ) It has, ( ) has not participated in a previous contract or subcontract subject to the Equal Opportunity clause of this solicitation;

(b) ( ) It has, ( ) has not, filed all required compliance reports; and

(c) Representations indicating submission of required compliance reports, signed by proposed subcontractors, will be obtained before subcontract awards.

(End of provision)

52.222-25 AFFIRMATIVE ACTION COMPLIANCE (FEB 1984)

The offeror represents that

(a) ☐ it has developed and has on file, ☐ has not developed and does not have on file, at each establishment, affirmative action programs required by the rules and regulations of the Secretary of Labor (41 CFR 60-1 and 60-2), or

(b) ☐ has not previously had contracts subject to the written affirmative action programs requirement of the rules and regulations of the Secretary of Labor.

(End of provision)

52.223-13 CERTIFICATION OF TOXIC CHEMICAL RELEASE REPORTING (OCT 2000)

(a) Submission of this certification is a prerequisite for making or entering into this contract imposed by Executive Order 12969, August 8, 1995.

(b) By signing this offer, the offeror certifies that--

(1) As the owner or operator of facilities that will be used in the performance of this contract that are subject to the filing and reporting requirements described in section 313 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) (42 U.S.C. 11023) and section 6607 of the Pollution Prevention Act of 1990 (PPA) (42 U.S.C. 13106), the offeror will file and continue to file for such facilities for the life of the contract the Toxic Chemical Release Inventory Form (Form R) as described in sections 313(a) and (g) of EPCRA and section 6607 of PPA; or

(2) None of its owned or operated facilities to be used in the performance of this contract is subject to the Form R filing and reporting requirements because each such facility is exempt for at least one of the following reasons:  
(Check each block that is applicable.)

( ) (i) The facility does not manufacture, process or otherwise use any toxic chemicals listed under section 313(c) of EPCRA, 42 U.S.C. 11023(c);

( ) (ii) The facility does not have 10 or more full-time employees as specified in section 313.(b)(1)(A) of EPCRA 42 U.S.C. 11023(b)(1)(A);

( ) (iii) The facility does not meet the reporting thresholds of toxic chemicals established under section 313(f) of EPCRA, 42 U.S.C. 11023(f) (including the alternate thresholds at 40 CFR 372.27, provided an appropriate certification form has been filed with EPA);

( ) (iv) The facility does not fall within Standard Industrial Classification Code (SIC) major groups 20 through 39 or their corresponding North American Industry Classification System (NAICS) sectors 31 through 33; or

( ) (v) The facility is not located within any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Northern Mariana Islands, or any other territory or possession over which the United States has jurisdiction.

(End of clause)

52.225-2 BUY AMERICAN ACT CERTIFICATE (MAY 2002)

(a) The offeror certifies that each end product, except those listed in paragraph (b) of this provision, is a domestic end product as defined in the clause of this solicitation entitled "Buy American Act --Supplies" and that the offeror has considered components of unknown origin to have been mined, produced, or manufactured outside the United States. The offeror shall list as foreign end products those end products manufactured in the United States that do not qualify as domestic and products.

(b) Foreign End Products:

Line Item No.:-----

Country of Origin:-----

(List as necessary)

(c) The Government will evaluate offers in accordance with the policies and procedures of Part 25 of the Federal Acquisition Regulation.

(End of provision)

52.227-6 ROYALTY INFORMATION (APR 1984)

(a) Cost or charges for royalties. When the response to this solicitation contains costs or charges for royalties totaling more than \$250, the following information shall be included in the response relating to each separate item of royalty or license fee:

(1) Name and address of licensor.

(2) Date of license agreement.

(3) Patent numbers, patent application serial numbers, or other basis on which the royalty is payable.

(4) Brief description, including any part or model numbers of each contract item or component on which the royalty is payable.

(5) Percentage or dollar rate of royalty per unit.

(6) Unit price of contract item.

(7) Number of units.

(8) Total dollar amount of royalties.

(b) Copies of current licenses. In addition, if specifically requested by the Contracting Officer before execution of the contract, the offeror shall furnish a copy of the current license agreement and an identification of applicable claims of specific patents.

(End of provision)

252.209-7001 DISCLOSURE OF OWNERSHIP OR CONTROL BY THE GOVERNMENT OF A TERRORIST COUNTRY (MAR 1998)

(a) "Definitions."

As used in this provision --

(a) "Government of a terrorist country" includes the state and the government of a terrorist country, as well as any political subdivision, agency, or instrumentality thereof.

(2) "Terrorist country" means a country determined by the Secretary of State, under section 6(j)(1)(A) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)(i)(A)), to be a country the government of which has repeatedly provided support for such acts of international terrorism. As of the date of this provision, terrorist countries include: Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria.

(3) "Significant interest" means --

(i) Ownership of or beneficial interest in 5 percent or more of the firm's or subsidiary's securities. Beneficial interest includes holding 5 percent or more of any class of the firm's securities in "nominee shares," "street names," or some other method of holding securities that does not disclose the beneficial owner;

(ii) Holding a management position in the firm, such as a director or officer;

(iii) Ability to control or influence the election, appointment, or tenure of directors or officers in the firm;

(iv) Ownership of 10 percent or more of the assets of a firm such as equipment, buildings, real estate, or other tangible assets of the firm; or

(v) Holding 50 percent or more of the indebtedness of a firm.

(b) "Prohibition on award."

In accordance with 10 U.S.C. 2327, no contract may be awarded to a firm or a subsidiary of a firm if the government of a terrorist country has a significant interest in the firm or subsidiary or, in the case of a subsidiary, the firm that owns the subsidiary, unless a waiver is granted by the Secretary of Defense.

(c) "Disclosure."

If the government of a terrorist country has a significant interest in the Offeror or a subsidiary of the Offeror, the Offeror shall disclose such interest in an attachment to its offer. If the Offeror is a subsidiary, it shall also disclose any significant interest the government of a terrorist country has in any firm that owns or controls the subsidiary. The disclosure shall include --

(1) Identification of each government holding a significant interest; and

(2) A description of the significant interest held by each government.

(End of provision)

252.247-7022 REPRESENTATION OF EXTENT OF TRANSPORTATION BY SEA (AUG 1992)

(a) The Offeror shall indicate by checking the appropriate blank in paragraph (b) of this provision whether transportation of supplies by sea is anticipated under the resultant contract. The term supplies is defined in the Transportation of Supplies by Sea clause of this solicitation.

(b) Representation. The Offeror represents that it:

\_\_\_\_ (1) Does anticipate that supplies will be transported by sea in the performance of any contract or subcontract resulting from this solicitation.

\_\_\_\_ (2) Does not anticipate that supplies will be transported by sea in the performance of any contract or subcontract resulting from this solicitation.

(c) Any contract resulting from this solicitation will include the Transportation of Supplies by Sea clause. If the Offeror represents that it will not use ocean transportation, the resulting contract will also include the Defense FAR Supplement clause at 252.247-7024, Notification of Transportation of Supplies by Sea.

(End of provision)

## Section L - Instructions, Conditions and Notices to Bidders

## CLAUSES INCORPORATED BY REFERENCE

52.207-2	Notice Of Cost Comparison (Negotiated)	FEB 1993
52.211-14	Notice Of Priority Rating For National Defense Use	SEP 1990
52.215-1	Instructions to Offerors--Competitive Acquisition	MAY 2001
52.215-16	Facilities Capital Cost of Money	OCT 1997
52.215-20 Alt IV	Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data (Oct 1997) - Alternate IV	OCT 1997
52.222-46	Evaluation Of Compensation For Professional Employees	FEB 1993
52.237-10	Identification of Uncompensated Overtime	OCT 1997

## CLAUSES INCORPORATED BY FULL TEXT

## 52.204-6 DATA UNIVERSAL NUMBERING SYSTEM (DUNS) NUMBER (JUN 99)

(a) The offeror shall enter, in the block with its name and address on the cover page of its offer, the annotation "DUNS" followed by the DUNS number that identifies the offeror's name and address exactly as stated in the offer.

(b) If the offeror does not have a DUNS number, it should contact Dun and Bradstreet directly to obtain one. A DUNS number will be provided immediately by telephone at no charge to the offeror. For information on obtaining a DUNS number, the offeror, if located within the United States, should call Dun and Bradstreet at 1-800-333-0505. The offeror should be prepared to provide the following information:

- (1) Company name.
- (2) Company address.
- (3) Company telephone number.
- (4) Line of business.
- (5) Chief executive officer/key manager.
- (6) Date the company was started.
- (7) Number of people employed by the company.
- (8) Company affiliation.

(c) Offerors located outside the United States may obtain the location and phone number of the local Dun and Bradstreet Information Services office from the Internet Home Page at <http://www.customerservice@dnb.com>. If an offeror is unable to locate a local service center, it may send an e-mail to Dun and Bradstreet at [globalinfo@mail.dnb.com](mailto:globalinfo@mail.dnb.com).

(End of provision)

## 52.216-1 TYPE OF CONTRACT (APR 1984)

The Government contemplates award of a CPFF/LOE contract resulting from this solicitation.

(End of clause)

52.233-2 SERVICE OF PROTEST (AUG 1996)

(a) Protests, as defined in section 33.101 of the Federal Acquisition Regulation, that are filed directly with an agency, and copies of any protests that are filed with the General Accounting Office (GAO), shall be served on the Contracting Officer by obtaining written and dated acknowledgment of receipt from:

U.S. Army Space and Missile Defense Command  
Contracting and Acquisition Management Office  
SMDC-CM-AK  
Room Number: 1D2100  
106 Wynn Drive  
Huntsville, AL 35805-1957

(b) The copy of any protest shall be received in the office designated above within one day of filing a protest with the GAO.

(End of provision)

52.252-1 SOLICITATION PROVISIONS INCORPORATED BY REFERENCE (FEB 1998)

This solicitation incorporates one or more solicitation provisions by reference, with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available. The offeror is cautioned that the listed provisions may include blocks that must be completed by the offeror and submitted with its quotation or offer. In lieu of submitting the full text of those provisions, the offeror may identify the provision by paragraph identifier and provide the appropriate information with its quotation or offer. Also, the full text of a solicitation provision may be accessed electronically at this/these address(es):

[www.arnet.gov](http://www.arnet.gov)

(End of provision)

52.252-5 AUTHORIZED DEVIATIONS IN PROVISIONS (APR 1984)

(a) The use in this solicitation of any Federal Acquisition Regulation (48 CFR Chapter 1) provision with an authorized deviation is indicated by the addition of "(DEVIATION)" after the date of the provision.

(c) The use in this solicitation of any \_\_\_\_\_ (48 CFR Chapter \_\_\_\_\_) provision with an authorized deviation is indicated by the addition of "(DEVIATION)" after the name of the regulation.

(End of provision)

SPECIAL INSTRUCTIONS FOR PREPARATION OF PROPOSALS:



**A. SUBMISSION OF PROPOSALS:** In addition to copies required in paragraph below entitled "General", your response to this solicitation shall be submitted as follows:

One (1) copy of the cost and technical proposals and one (1) copy of SF 33 and Section K, Representations, Certifications, and Other Statements of Offerors, to both your cognizant DCAA Auditor and ACO, whose name, address and telephone number the offeror shall provide below:

ACO: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

DCAA: \_\_\_\_\_

**B. INSTRUCTIONS FOR THE COMPLETION OF SOLICITATION PART I - THE SCHEDULE:** The offeror shall complete the blank spaces in the following solicitation Schedule sections hereof:

- (1). SF 33: Complete Items 12 through 18 as applicable.
- (2). Insert the total dollar amount proposed for "CLIN 0001" and "TOTAL."
- (3) (a) Insert estimated cost dollar amount proposed, exclusive of fixed fee in subparagraph a.
- (b) Insert fixed fee dollar amount proposed in subparagraph b.
- (c) Insert the total contract dollar amount proposed in subparagraph c.

**GENERAL:**

- A. For purposes of this RFP, a page is defined as a standard 8 1/2" x 11" sheet of paper. Pitch shall be 10 to 12, or equivalent. "Newspaper copy type" style (two column format is permissible.) 1-inch margin, all sides; single-spaced. Foldouts are permissible; however, each 8 1/2" x 11" fold will count as one page. All pages shall be numbered. Print both sides of the paper, head to head.

		NUMBER OF COPIES			NUMBER OF PAGES
		PAPER	COMPUTER	DISK	
Volume I	General	5	1		15
Volume II	Technical (Do Not Include Resume and Sample Pages)	5	1		25
Volume III	Management	5	1		15
Volume IV	Cost - No Limit	3	2		

B. Award without discussion. The Government reserves the right to award the contract without discussions, based on proposal submissions.

C. All electronic data must be for Office 2000, virus free, on 3.5 (1.44mb) floppy disk, 3,8" (100 MB) iomega Zip disk drive, and/or on Compact Disk (CD). If files are compressed, they must be self-extracting-archives (no software needed to decompress. If files contain links, the link must be intact and maintained through all revisions. One of your disk copies for your Cost Volume may be write protected. The remaining copy shall not be read/write/password protected. The diskettes containing cost data shall contain all formulas used in building up your proposal. Your electronic spreadsheet shall contain your cost element breakdown by Contract Line Item Number (CLIN) as well as a spreadsheet that roll-ups to a Grand Total Summary by cost element.

#### VOLUME DESCRIPTION:

1. *Volume I - General:* The General Volume shall consist of an actual offer to enter into a contract to perform the desired work. It will include representations, certifications, and acknowledgments, pertinent to the Scope of Work. No technical data shall be included in this volume. This volume will not be evaluated.

All materials submitted under this RFP is as follows:

a. Mailing Address:

United States Army Space & Missile Defense Command  
ATTN: SMDC-CM-AK/Tullie Miller  
P.O. Box 1500  
Huntsville, AL 35807

b. Street Address:

United State Army Space & Missile Defense Command  
ATTN: SMDC-CM-AK/Tullie Miller  
06 Wynn Drive, NW  
Huntsville, AL 35805-1990

For deliveries to the facility, please leave submissions at the loading dock. Point of Contact is Ms. Tullie Miller, 955-3699.

All documentation shall be provided not later than the due date specified on DD form 1707.

2. *Volume II - Technical:* Submissions included in the Technical Volume will include the following:

A. Detailed description of the offeror's activities pertaining to one (1) or more previous display efforts accomplished under other contracts. This information should be submitted in the following format:

*Purpose or goal of project:* Describe the purpose or the message, which was to be conveyed by the display, the target audience(s), and the types of locations where the display was used.

*Rational for selection of various media:* Describe the reason for the selection of the various media used for the display and associated materials.

*Description of activities:* Describe offeror's activities for each phase listed below; provide name of subcontractor(s) and describe the activities performed by all subcontractors who worked under offeror's direction; or indicate N/A" for "not applicable" if the particular phase was not performed by the offeror or the offeror's subcontractor. This description shall be broken out into the six (6) phases A-F, which are described in SOW paragraph 3, (i.e.

preliminary concept definition, detailed final design, fabrication, maintenance and updates, storage, and delivery and operation).

*Samples to demonstrate proficiency and artistic ability in various media:* Samples submitted will be limited to: paper; VHS videotape; Compact Disc, CD; and Digital Video Disc, DVD. Paper samples of the following types of materials shall be no larger than 8 1/2" x 11": Copies of layouts or drawings; photographs or computer printouts of art work or completed displays; actual or copies of printed brochures or flyers; and photographs of three dimensional promotional items (do not submit actual items). Videotapes of the following shall be 1/2" standard VHS format: video productions, animation sequences, computer demos, or footage showing displays or associated materials. The offeror shall furnish only one (1) set of the referenced samples and these samples are not included in the page limitation. All samples must be clearly marked with the offeror's name. Materials, which are not labeled, will not be considered.

B. A list of key personnel with a brief description of which duties they will perform as related to the six (6) phases A-F of SOW paragraph 3. Include a brief resume of the background experience of all personnel listed, addressing experience pertinent to the proposed effort. Include in the resume the individual's company personnel classification AND the cost proposal classification. Resumes shall be restricted to three 8 1/2" x 11" page submissions per individual. A sample resume is at Attachment 1.

For key personnel who are not employed by the offeror at the time of the proposal submission, the offeror shall submit a letter of intent, including individual's requested/offered salary, signed by the individual and attached to the resume. For proposal preparation purposes, key personnel are described as the; Project Manager, Art Director, Illustrator/Graphic Computer Specialist, General Designer, Assistant Director, Videographer and Script Writer. If the Offeror does not currently employ or does not plan to employ any one or more of these categories of labor, but plans to subcontract for these services, these plans should be discussed in the "management proposal" section.

C. The offeror shall provide detailed description and/or pictorial diagram of the facilities, equipment, materials, and software available for accomplishment of the Scope of Work under this contract. The offeror may also include information relating to subcontractors.

### 3. Volume III - Management Proposal

A. Provide a comprehensive description of the proposed management structure and approach for accomplishing the SOW effort. The offeror shall describe the organization's structure, to include major subcontractors, and describe how these organizational elements relate to the overall corporate structure. The offeror shall also provide a description of a management plan and strategy for handling the activities and allocating resources under this particular contract. This description shall be broken out into the six (6) phases A-F, which are described in SOW paragraph 3. This shall include: (i) The responsibilities, lines of authority, and span of control; (ii) the relationship among the prime contractor and subcontractors and the process for assigning SOW; (iii) the flow of information among the offeror's contractor team, requiring activities, and external organizations. The offeror shall indicate the process for managing and controlling subcontractors to include the reporting and review requirements imposed and the process for timely incorporation of subcontractor financial information into the prime's data. The offeror shall indicate the management control system established for effective planning and control of resources, to include the processes for: Scheduling, budgeting, and accumulation of cost; identifying cost and schedule problems; performing estimates of completion; and providing timely detailed performance status reports to management and the Government.

B. The offeror shall provide a summary of not more than 5 previous government or private sector contracts performed over the past five years, which were similar to this requirement. The offeror shall also provide contract numbers and name of client. The proposal shall include a statement as to whether these contracts were successfully completed with regards to cost, schedules, and performance.

C. The offeror shall submit past performance data, as specified below, directly to the address listed below, not later than two weeks after the RFP release date:

U.S. Army Space and Missile Defense Command  
RFP# DASG60-03-R-0010  
P.O. Box 1500, SMDC-CM-AK  
Huntsville, AL 35807-3801

- (1) The offeror shall submit a brief synopsis of not more than the five most relevant and similar contracts performed during the past 5 years by the offeror and by each subcontractor (work done, as both prime and subcontractor may be included). The input shall be in the following format:

Contracting Activity and Address

Procuring Contracting Officer's name, office symbol, telephone number, and fax number

Technical Point of Contact's name, office symbol, telephone number, and fax number

Contract number and SOW title

Type of contract

Contract Price

Contract Period of performance

- (2) For each of the not more than 5 referenced contracts included in the synopsis for the offeror and each subcontractor, the offeror shall submit a narrative description that shall include, but is not limited to, a brief description of the following:

SOW;

Management complexity;

Performance objective achieved

Performance/personnel problems encountered and their solutions; and

Cost overrun or schedule delay encountered

D. The offeror shall complete Section I and II of the attachment Past Performance Questionnaire Form for each of the referenced contracts. The Past Performance Form for each referenced contract shall then be submitted by the offeror to the applicable Procuring Contracting Officer (PCO) not later than two weeks after the RFP release date, utilizing letter from the SMDC PCO set forth in the attachment. The PCO shall be requested to complete Section III Evaluation and submit the completed form directly to the address above not later than 30 days from the RFP release date. The offeror is responsible for any necessary follow-up to the PCO to ensure timely submission of the completed Past Performance Evaluation Form.

4. *Volume IV - Cost:* The cost proposal shall be submitted based upon labor hours and rates for labor categories. The proposal shall also include pricing for storage by cost per cubic foot based on an estimated volume of 11,000 Cubic Feet.

Delivery Instructions: Offeror's shall submit three (3) written copies of the cost proposal and two (2) copies of the cost proposal. Offerors shall save the Cost Volume on a separate diskette/CD from the Technical/Management Volumes. All electronic submissions must be readable using the Microsoft Windows operating system and Microsoft Office 2000 or greater, and be virus free. If files are compressed, they must be self-extracting-archives (no software needed to decompress). If files contain links, the links must be intact and maintained through all revisions. One of your disk copies for your Cost Volume may be write protected. The remaining copies shall not be read/write/password protected. Include the following on the "Cost Diskettes":

1) A breakdown of cost by CLIN by Contractor Year by Cost Element. Roll the CFY breakdown into a total CLIN breakdown. Roll the CLIN breakdown into a Grand Summary. EACH summary shall be broken down into hours, rates and dollars. Furnish supporting breakdowns for each cost element, consistent with your cost accounting system. INCLUDE THE FORMULAS in your spreadsheets.

2) Any computations you used to develop your labor and/or indirect rates. **INCLUDE THE FORMULAS** in your spreadsheets.

In accordance with 15.402, 15.403-1, and 15.403-5(a)(1), certified cost or pricing data are not required based on the fact that adequate competition is expected for this procurement.

In accordance with 15.408(l) and clause 52.2115-20, alternate (IV), the following instructions are provided.

Sample cost proposal spreadsheets can be found at [www.smdc.army.mil](http://www.smdc.army.mil); click on Business, then Special Announcements, then Sample Spreadsheet.

The proposal shall be based upon labor hours and rates, indirect rates, subcontract costs, etc. that are reasonable and achievable.

By submitting your proposal, you grant the Contracting Officer or an authorized representative the right to examine records that formed the basis for the pricing proposal. That examination can take place at any time before award. It may include those books, records, documents, and other types of factual information (regardless of form or whether the information is specifically referenced or included in the proposal as the basis for pricing) that will permit an adequate evaluation of the proposed price.

**FAILURE TO COMPLY WITH RFP REQUIREMENTS FOR COST INFORMATION MAY RESULT IN AN ADVERSE ASSESSMENT OF YOUR PROPOSAL AND REDUCE OR ELIMINATE YOUR CHANCE OF BEING SELECTED FOR AWARD. WHEN AN OFFEROR FAILS TO FURNISH COST INFORMATION REQUIRED BY THE RFP, THE GOVERNMENT MAY UTILIZE COMPARABLE COST INFORMATION FROM OTHER SOURCES FOR PURPOSES OF COMPLETING ITS EVALUATION. UNDER THESE CIRCUMSTANCES, THE OFFEROR BEARS FULL RESPONSIBILITY FOR ANY ADVERSE EVALUATION IMPACT WHICH MAY RESULT FROM HIS FAILURE TO FURNISH COST INFORMATION REQUIRED BY THE RFP.**

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### SECTION I

Include an index showing section number, title, and proposal page number.

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### SECTION II

For pricing purposes, provide an estimated start date of 1 Oct 03. Include the proposed contract type and period of performance. Submit with your proposal any information reasonably required to explain your estimating process, including the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data; and the nature and amount of any contingencies included in the proposed price. Provide any other General Information that may be beneficial in evaluation of your proposal.

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### Section III:

Provide the following information:

- (1) Solicitation number;
- (2) Name, address, and e-mail address of offeror;
- (3) Name, telephone number, and e-mail address of point of contact at contractor's facility;

- (4) Name, address, voice telephone number of contract administration office;
- (5) Name, address, voice telephone number, fax number, and e-mail address of cognizant Defense Contract Audit Agency;
- (6) Type of contract (that is CPFF Level of Effort);
- (7) Proposed cost; profit or fee dollars, cost of money dollars, and total for overall contract;
- (8) Place(s) and period(s) of performance;
- (9) Whether you will require the use of Government property in the performance of the contract, and, if so, what property;
- (10) Whether your organization is operating under an accounting system that has been approved for cost type contracts. Whether your organization is subject to cost accounting standards; whether your organization has submitted a CASB Disclosure Statement, and if it has been determined adequate; whether you have been notified that you are or may be in noncompliance with your Disclosure Statement or CAS, and, if yes, an explanation; whether any aspect of this proposal is inconsistent with your disclosed practices or applicable CAS, and, if so, an explanation; and whether the proposal is consistent with your established estimating and accounting principles and procedures and FAR Part 31, Cost Principles, and, if not, an explanation;
- (11) A listing by Line Item Number of each line item's applicable cost, fee, COM, and total dollars;
- (12) Date of submission; and
- (13) Name, title and signature of authorized representative.

#### SECTION IV

Provide a Cost Element Breakdown by **Contract Line Item Number (CLIN)** by Contractor Fiscal Year (CFY). Roll the CFY breakdown into a total CLIN breakdown. Roll the CLIN breakdown into a Grand Summary. EACH summary shall be broken down into hours, rates, and dollars. Furnish supporting breakdowns for each cost element, consistent with your cost accounting system.

#### SECTION V

##### LOE Hours

Following are the Government's estimated breakdowns of the DPPH level of effort under this solicitation/contract. The estimates are by Government Fiscal Year (GFY). These exact breakdowns shall be used by offerors for proposal preparation purposes. The resultant contract shall contain the total DPPH shown below for each CLIN without any such labor category or fiscal year breakdowns. **THERE SHALL BE NO DEVIATION PROPOSED FROM THE HOURS AND BREAKDOWNS SHOWN BELOW.** The cost proposal shall reflect a proposed price based upon the delineated hours.

##### a. Estimated Fiscal Year Breakdown:

If you split up the hours between you and your subcontractors, provide a chart showing the hours proposed by you and your subcontractors; show that the total proposed equals the amount delineated in the RFP.

CLIN	OPTION	GOVT FY	TOTAL HRS
0001	BASIC	04-05	29,978
0002	DATA		
0003	OPT. 01	06	14,213
0004	OPT. 02	07	13,749
0005	OPT. 03	08	13,295
0006	OPT. 04	09	12,848
0007	OPT. 05	10	12,408
		TOTAL HOURS	96,491

## SECTION VI

NOTE: The following labor rate tables are to be used as guidelines. If you must compute your rates in another manner, the following shows the level of detail at which you are required to provide your proposed cost.

Example of the type of information needed if you compute future labor rates by straight escalation and you don't have a forward pricing rate agreement/forward pricing rates that preclude(s) your using this method.

Labor Rates Section

Provide a time-phased breakdown of labor rates by Contractor Labor Category title (as recognized by DCAA) for each CLIN and each CFY, as follows. Furnish bases for estimates.

TABLE 1 - CLIN Level, Contractor Fiscal Year Level

	Base Labor Rate <sup>b</sup>	Escalation Rate <sup>c</sup>	Number of Months <sup>d</sup> at proposed escalation rate	Provide Month/year to which you are escalating	Escalated Labor Rate
Contractor Labor Cat <sup>a</sup>					
Contractor Labor Cat <sup>a</sup>					

TABLE 1 Continued - CLIN Level, Contractor Fiscal Year Level

	Uncompensated O/T Percentage <sup>c</sup>	Rate Include Uncomp O/T
Contractor Labor Cat <sup>a</sup>		
Contractor Labor Cat <sup>a</sup>		

<sup>a</sup>Contractor Labor Category - Provide contractor category rates or names of individuals, as applicable.

<sup>b</sup>Base Labor Rate - Show base labor rates by contractor labor category. Provide effective date of payroll register from which base labor rates were obtained. For time periods after the first period, provide starting date of base rate.

<sup>c</sup>Escalation Rate - Provide source of escalation - e.g. Data Resources Incorporated recommendations, company experience (provide escalation rates experienced over the last two years, if applicable), etc. Add escalation rate and number of month columns as necessary to accommodate for different escalation rates as necessary for each time period.

<sup>d</sup>Number of Months at the proposed escalation rate - Begin escalating at payroll register date. Be clear regarding your "escalating from" and your "escalating to" dates. Show that your number of months equal that time period if not obvious.

<sup>e</sup>Uncompensated Rate - Provide uncompensated overtime percentage; example of computation follows, including number of hours per week which are proposed as uncompensated hours.

45 hours proposed on a 40 hour work week basis =  $45/40 = 12.5\%$  uncompensated overtime percentage.

**OR**

Contractor, provide the following rationale if you are proposing future labor rates in accordance with a forward pricing rate agreement/forward pricing rates. If agreement has been reached with Government representatives on use of forward pricing rates/factors, identify the agreement, include a copy, and describe its nature.

#### Contractor FY Level

Labor Rate by CFY	Effective Date of Rate	Time Period
Contractor Labor		
Cat <sup>a</sup>		
Contractor Labor		
Cat <sup>a</sup>		

<sup>a</sup>Contractor Labor Category - Provide contractor category rates or names of individuals, as applicable.

Provide uncompensated overtime percentage; example of computation follows, including number of hours per week which are proposed as uncompensated hours.

45 hours proposed on a 40 hour work week basis =  $45/40 = 12.5\%$  uncompensated overtime percentage.

## SECTION VII

### Indirect Rates

1. Provide a breakdown of indirect rates by Contractor Category title (as recognized by DCAA) for each CLIN, broken down as follows.

Indirect Rate by CFY	Effective Date of Rate	Time Period
Contractor Labor		
Cat		
Contractor Labor		
Cat		

2. State whether the indirect rate is applicable to this contract only or whether it is to be spread across several of your contracts.



3. Will award of this contract materially affect any of your indirect rates? If no, so state. If yes, describe which will be affected and how and insure that DCAA has a copy of the rates used in your proposal and the applicable backup to the rates.

4. Provide the actuals for the last two (2) years for all indirect rates that you are proposing. If a comparison of this procurement's rates to prior year rates is not applicable, so state and state reason for differences.

5. Provide the computations (i.e. breakdown of expenses, base) for each proposed indirect rate. Show trends and budgetary data to provide a basis for evaluating the reasonableness of proposed rates.

6. If agreement has been reached with Government representatives on use of forward pricing rates/factors, so state.

## SECTION VIII

### Interdivisional Transfers

If Interdivisional transfers of cost are applicable, provide the following:

-Information required by Sections I, II, III, IV, VI, and VII (above) and relating to the interdivisional transfer cost.

### Subcontracts

Note: For purposes of the following requirements, the total cost by vendor is the pertinent referenced dollar amount.

**For non-commercial subcontract proposals for which competition was not obtained and whose proposed cost falls between the cost and pricing threshold at 15.403-4(a)(1), and the lower of either \$10,000,000 or more or both more than the pertinent cost or pricing data threshold and more than 10 percent of the prime contractor's proposed price, provide the following:**

a) **In accordance with FAR 15.404-3, submit a detailed price or cost analysis of each subcontractor at the time of submittal of your written cost proposal.** If you received information from DCAA or DCMC regarding the subcontractor's rates, provide either the verbal or written record of your conversation including: the person with whom you spoke; their telephone number; a copy of the information provided and the date of receipt of the information.

Provide a breakdown of the subcontract proposal that is sufficiently adequate for the Government reviewer to understand exceptions taken by the prime contractor to the subcontractor's proposal.

b) If the prime contractor is unable to obtain sufficient data from the contractor or from DCAA to perform an adequate price/cost analysis of the subcontractor's proposal, submit information relating to Sections I, II, III, IV, VI, and VII above to the Government at the time of submittal of your proposal.

c) Whether the subcontractor has an adequate accounting system. Whether the subcontractor has an approved purchasing system.

d) Whether the prime contractor has negotiated with the subcontractor. If negotiations have taken place, provide the negotiation memorandum, including the concessions made by both parties, the original proposed price, the negotiated price.

**For non-commercial subcontract proposals for which competition was not obtained and whose proposed cost falls between the cost and pricing threshold at 15.403-4(a)(1), and the lower of either \$10,000,000 or more or both more than the pertinent cost or pricing data threshold and more than 10 percent of the prime contractor's proposed price, provide the following:**

Have the subcontractor provide (either through you or directly to the Contracting Officer) the information required by Sections I, II, III, IV, VI, and VII (above) and relating to the subcontract cost.

- If competition was received for an item provide quotes from each vendor showing comparable pricing. Provide data showing the degree of competition and the basis for establishing the source and reasonableness of price for those acquisitions (such as subcontracts, purchase orders, material order, etc.) exceeding, or expected to exceed, the appropriate threshold set forth at FAR 15.403-4 priced on the basis of adequate price competition.

- If the item is a commercial item in accordance with FAR Part 2.101,

a) - furnish backup that shows the price for which the item was offered or sold to the public (i.e. catalogues, invoices where it was previously sold to the public, etc.).

b) - provide evidence (e.g. purchase orders) that the item(s) was sold to the public.

c) - If there are differences between the cost of the item offered/sold to the public and the cost in the proposal, provide complete, detailed, backed-up data regarding the differences.

## **SECTION IX**

The government's estimate of direct travel costs required to perform the contract is shown below. Any indirect charges applicable to these direct travel costs are in addition to these costs and shall be identified separately in the offeror's cost proposal. For proposal preparation purposes, the offeror's proposed travel prices shall include the direct travel costs shown below and the offeror's proposed indirect costs that are associated with these direct travel costs. The cost proposal shall reflect a proposed price based upon the delineated travel cost.

CLIN <u>0001</u>	\$60,000
CLIN <u>0003</u>	\$30,000
CLIN <u>0004</u>	\$30,000
CLIN <u>0005</u>	\$30,000
CLIN <u>0006</u>	\$30,000
CLIN <u>0007</u>	\$30,000

If the cost of travel is split between you and your subcontractors, provide a chart showing the travel cost proposed by you and that proposed by your subcontractor(s); show that the total proposed direct travel cost exactly equals the amount delineated in the RFP.

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**SECTION X**

Materials pricing includes but is not limited to exhibit structure, ancillary equipment to include, display tables, computer hardware and software, video monitors, multi-media equipment, video and audio cables, etc. This does not include routine/recurring materials and ODC costs which are ordinarily associated with the contractor's services. Therefore, the contractor's facilities costs are not allowable under these CLINs.

The government's estimate of material required to perform the contract is shown below. Any indirect charges applicable to these costs shall be in addition to the cost identified below and shall be identified separately in the offeror's cost proposal. For proposal preparation purposes, the offeror's proposed prices shall include the material costs shown below and the offeror's proposed indirect costs that are associated with these ODC costs. The cost proposal shall reflect a proposed price based upon the delineated material cost.

<b><u>CLIN 0001</u></b>	<b>\$430,949</b>
<b><u>CLIN 0003</u></b>	<b>\$215,474</b>
<b><u>CLIN 0004</u></b>	<b>\$215,474</b>
<b><u>CLIN 0005</u></b>	<b>\$215,474</b>
<b><u>CLIN 0006</u></b>	<b>\$215,474</b>
<b><u>CLIN 0007</u></b>	<b>\$215,474</b>

If the cost of material is split between you and your subcontractor(s), provide a chart showing the material cost proposed by you and that proposed by your subcontractor(s); show that the total proposed direct cost of material exactly equals the amount delineated in the RFP.

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**Section XI****Facilities Capital Cost of Money**

When you elect to claim facilities capital cost of money as an allowable cost, you must submit Form CASB-CMF and a DD Form 1861-1 for each Cost Accounting Period applicable to this proposal (see FAR 31.205-10.) Insure that your calculations are based on the latest Treasury Rate (rates are updated every January and July) and that you have included your percent distribution of Land, Building and Equipment.

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**SECTION XII****Fee/Profit**

Provide your proposed fee/profit percentage and base.

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**SECTION XIII**

**Request for Rate Information Form**

Complete the following Request for Rate Information Form and include with your cost proposal. The form will be used to request rate information on your firm from the Defense Contract Audit Agency with cognizance over you.

### Request for Rate Information

**Note: Complete this form for every Prime Contractor proposal, every interDivisional proposal, and every non-commercial, non-competitive Subcontract Proposal over \$550,000 for which the prime contractor has not submitted an adequate detailed cost and price analysis.**

Note to contractor: Please verify that this is the correct DCAA and DCMC that has cognizance over you and that you are providing their latest correct addresses and phone numbers.)

DCAA Address

DCMC Address

Voice Phone Number: ( )

Voice Phone Number: ( )

E-Mail Address:

E-Mail Address:

Fax Phone Number: ( )

Fax Phone Number: ( )

Type of Contract: CPFF ( ) CPFF LOE ( ) CPAF ( ) CPAF LOE ( )  
CPIF ( ) CPIF LOE ( ) FPI ( ) FPI LOE ( ) FFP ( ) FFP LOE ( ) OTHER \_\_\_\_\_ ( )

**Proposed \$ Amount:**

(Note to contractor: If this is not a straight addition to a contract or new contract, provide explanation, i.e. \$ \_\_\_\_\_ Deleted from contract; \$ \_\_\_\_\_ Added to contract; \$ Net change to contract \_\_\_\_\_.)

**Proposal Identifying Numbers:**

(Note to contractor: Such as RFP number, Contractor Proposal No. - Explain type of identifier.)

**Contractor Name:**

**Contractor Address:**

(Note to contractor: include division and zip code)

Prime Contractor ( ) Subcontractor ( )

If subcontractor, provide Prime contractor name:

Small Business ( ) Large Business ( ) 8a Contractor ( )

**Title of Effort:**

(Note to contractor: Include any applicable contract modification numbers here.)

**Point of Contact at Contractor's Facility:**

POC's phone number:

POC's E-Mail Address:

POC's Fax number:

**Note to contractor: Provide in the following chart ALL rates,**

(Direct, Indirect and Other Direct Cost rates) which are included in your proposal. Insure that DCAA has a complete "full-up" copy of your proposal. Also insure that DCAA has the backup to all proposed rates.

<u>Category</u>	<u>Base* in Proposal to Which Rate is Applied</u>	<u>Proposed Rate</u>	<u>Contractor Fiscal Year</u>
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(Note to contractor: Include full description to enable DCAA to identify category referenced)

**Examples of Bases:** For Direct Labor the base might be hours; for Overhead the base might be Direct Labor Dollars; For Fee the base might be Labor plus Overhead plus Other Direct Cost.

Type of System	Applicability to this contract	If applicable, Date of Approval, Point of Contact and POC phone number
Accounting System		
Cost Accounting Standards Disclosure Statement		
Purchasing System		
Estimating System		
Material Management Accounting System		

In the space below, list and explain all Non-Compliance with Cost Accounting Standards issues as well as Accounting, Estimating, Material and Purchasing System deficiencies. Also explain their applicability to this proposal and actions taken by you to correct the deficiencies (or comments on the deficiencies).

SECTION XIV50% RuleCALCULATION FOR "FIFTY PERCENT" RULE:

a. In accordance with FAR 52.219-14, LIMITATION ON SUBCONTRACTING, DEC 96, this provision applies to small business restricted awards only.

b. The contractor shall furnish a matrix depicting the total allocation of DPPHs and their associated price/hour between the prime\* and each subcontractor or consultant. The price/hour includes the following elements:

- 1.) Direct Labor
- 2.) Direct Labor Overhead
- 3.) General & Administrative

If the prime\* adds any indirect costs to a subcontractor's or consultant's proposed price, that additional dollar amount must be added to the subcontractor's price for purposes of 50% rule calculations.

\*The term "prime" may include Joint Ventures and Teams in certain situations. See the following Code of Federal Regulation (CFR) citations for detailed guidance as to those situations:

- 13 CFR 125.6 (g)
- 13 CFR 121.103 (f)(3)
- 13 CFR 124.513 and
- 13 CFR 126.616

CLIN \_\_\_\_\_

	<u>Prime</u>	<u>Subcontractors</u>		
		<u>Sub 1</u>	<u>Sub 2</u>	<u>....Total Subs</u>
# of Labor Hours				
Labor Hour \$s				
Labor O/H \$s				
Applicable G&A \$s				
Total Dollars				

CLIN \_\_\_\_\_

	<u>Prime</u>	<u>Subcontractors</u>		
		<u>Sub 1</u>	<u>Sub 2</u>	<u>....Total Subs</u>
# of Labor Hours				
Labor Hour \$s				
Labor O/H \$s				
Applicable G&A \$s				
Total Dollars				



TOTAL CONTRACT

	<u>Prime</u>	<u>Subcontractors</u>	
		<u>Sub 1</u>	<u>Sub 2</u> .... <u>Total Subs</u>
# of Labor Hours			
Labor Hour \$s			
Labor O/H \$s			
Applicable G&A \$s			
Total Dollars			

**ATTACHMENT 1**  
**RESUME FORMAT**

**NAME:**                      **COMPANY:**

**SECURITY CLEARANCE AND DATE GRANTED:**

**PROPOSED GOVERNMENT LABOR CATEGORY (SEE RFP):**

**COMPANY PERSONNEL CLASSIFICATION:**

**LABOR CATEGORY CLASSIFICATION IN COST PROPOSAL:**

**THE MOST SIGNIFICANT SOW RELATED TECHNICAL ACCOMPLISHMENT IN THE LAST 5 YEARS:**

**THE MOST SALIENT SKILL THAT RELATES TO THE PROPOSED EFFORT:**

**EDUCATION:**

**SPECIAL TRAINING:**

**EXPERIENCE:** (For each employee, in reverse chronological order, list the inclusive dates, employer, and a brief description of the task performed and job titled. The inclusive dates, duties and level of responsibility should be identified for each job title.)

**RELATED EXPERIENCE:** (Specify experience pertaining to the duties they will perform related to the six (6) phases A-F of SOW paragraph 3.)

## Section M - Evaluation Factors for Award

## CLAUSES INCORPORATED BY FULL TEXT

**EVALUATION AREAS/FACTORS/SUBFACTORS:**

M-1. GENERAL. The Government will make award to the responsible offeror whose conforming offer represents the best value for the Government, considering the technical, management, total evaluated probable cost, and other factors set forth below. The Government will evaluate offers by adding the total price for all options to the total price for the basic requirement. Evaluation of options will not obligate the Government to exercise the options. The Government may choose not to afford offerors an opportunity to revise or modify their offers before award of a contract. The Government reserves the right to award based on initial proposals.

## M-2. EVALUATION AREAS/FACTORSSUBFACTORS.

A. Technical Area – The technical quality of the offeror's submission in meeting the requirements of the statement of work will be evaluated using the following factors:

1. Portfolio – The information provided in the Purpose or Goal(s) of the special instructions (i.e. the message, the target audience(s), and the types of locations where previous displays were used) will provide the basis for the evaluation of the offeror's detailed written description of activities performed during previous display efforts.

a. Accomplishment of Goals. The following will be assessed to determine to what extent the purpose and goal(s) were accomplished with specific attention to:

- (1) Appropriateness of the media(s) selected;
- (2) Success of message conveyance;
- (3) Effective use of resources and manpower throughout each phase of display services.

b. Overall Impact of Display. Samples submitted showing work accomplished on past efforts will be used to evaluate overall display design and impact in terms of the following:

- (1) Degree to which the display demonstrates attention getting features which would attract viewers and hold their interest;
- (2) Whether the display appears as a cohesive unit with successful integration of the various media and design elements complementing each other and working together to convey the message(s).

c. Demonstrated Proficiency. Samples submitted showing work accomplished on previous efforts will also be assessed in terms of the demonstrated proficiency and artistic ability in the following:

- (1) Fabrication techniques in terms of sturdy construction which will withstand the rigors of packing and unpacking repeatedly and innovative use of standard and new materials to create visual impact or to hold down costs;
- (2) Graphic elements and type styles in terms of eye appeal, and appropriateness to the message being conveyed and the target audience(s);
- (3) Photographic materials in terms of composition, and print quality;

- (4) Illustrations in terms of composition and mastery of media and technique;
- (5) Printed promotional materials in terms of layout design and printing quality;
- (6) Computer graphic demos, video and interactive video presentations in terms of impact and effectiveness; demonstrated mastery of various media (i.e. video production, animation, printed materials, creation of original art and photography); and successful use of design elements, (i.e. colors, type styles, artwork and photographs) and the overall impact of the display.

2. Personnel – The Government will assess the qualifications of the offeror's proposed representative personnel on the basis of their resumes against the requirements of the RFP. Evaluation will be inclusive of both personnel in the employ of offerors and personnel who might be, if such resumes are accompanied by a Letter of Commitment signed by the individual. The Government plans to evaluate whether the offeror has demonstrated sufficient understanding of the potential personnel qualifications required to perform tasks delineated in the SOW. The offeror's proposal will be evaluated in terms of proposed personnel's educational background, including degrees, certificates, and on-the-job training; and in terms of recent experience in similar efforts as an indicator of potential success in accomplishing the requirements of the SOW.

3. Facility and Equipment – The offeror's proposal will be evaluated on the facility, equipment, materials, and software available for production of displays and all associated materials for display storage.

B. Management Area – The offeror's proposed management approach will be evaluated using the following factors:

1. Organization Structure – The offeror's proposal will be evaluated to determine the extent to which it demonstrates a sound management approach suited to the successful accomplishment of the requirements of the SOW. The roles of any team members and subcontractors will be included in this evaluation. Emphasis will be placed on the following: organizational structure, management approach, responsiveness to requirements, allocation of resources, and organizational skills evident in offeror's proposed strategy to meet the complex requirements of this SOW.

2. Past Performance

a. Past performance information identified or provided by an offeror, as well as information obtained from any other sources, will be evaluated as one indicator of an offeror's ability to perform the resulting contract successfully. Consideration will be given to past and current Federal, State, and local government and private contracts for efforts similar to this Display Service requirement. If required, the Source Selection Authority will determine the relevance of similar past performance information.

b. The currency and relevance of past performance information; source of the information; context of the data; general trends in contractor's performance; and problems encountered on the identified contracts and the offeror's corrective action will be taken into consideration. Past performance evaluation will also take into account information regarding predecessor companies, key personnel who have relevant experience, and/or subcontractors that will perform major or critical aspects of the requirement when such information is relevant to the instant acquisition.

c. Satisfaction of client and successful completion of contract with regards to cost, schedules, and performance will be considered to determine the offeror's ability to meet the requirements of this sow.

- d. In the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror will not be evaluated favorably or unfavorably in past performance.

**C. Cost Area.** The Cost Area includes two evaluation factors: Cost Realism and Total Evaluated Probable Cost (TEPC).

1. **Cost Realism:** The proposal will be analyzed to assess the likelihood that the technical and management approaches proposed could be accomplished at the cost proposed. This is a measure of the programmatic risk based on the technical/management approach. The results of the cost realism assessment will be applied to the evaluation of the technical and management areas to aid in assessing the offeror's understanding of the magnitude and complexity of the contract requirements. The cost realism assessment is utilized in developing TEPC.

2. **TEPC:** The proposal will be evaluated to develop the government's estimate of the most probable cost of successfully completing the contract using the technical and management approaches proposed. TEPC consists of the government's estimate of the realistic cost of completing the offeror's proposal, to include the government's assessment of program risk (including cost realism), and additional costs to the government such as government furnished property, government furnished information, transportation, and other related cost factors.

### M-3. RELATIVE IMPORTANCE OF EVALUATION CRITERIA

A. **Technical Area** - The Technical area is significantly more important than the Management area. The Personnel factor is slightly less important than the Portfolio factor; the Facility & Equipment factor is slightly less important than the Personnel factor.

B. **Management Area** - The Management area factors are of approximately equal importance.

C. **Cost Area** - The Cost Area, which will not be rated or scored, is a substantial evaluation criteria; however, it is less important than the Technical and Management Areas combined.

D. Cost realism is a very important consideration in the evaluation of the technical and management areas. Poor cost realism may result in a lower evaluation of the technical or management areas. Offerors submitting cost proposals that are so unrealistically high or low as to preclude a reasonable chance of being selected for award may be excluded from the competitive range.

E. The Government will select for award the proposal which is most advantageous to the government considering the technical, management, and cost areas. The government may select for award the offeror whose total evaluated probable cost is not necessarily the lowest, but whose technical and management proposals are sufficiently more advantageous to the government so as to justify the payment of additional costs. Conversely, the government may select for award the offeror whose total TEPC is lower than one or more other proposals or when other offerors' technical/management proposals are not sufficiently more advantageous so as to justify the payment of additional costs.

Department of the Army

U.S. Army Space and Missile

Defense Command

P.O. Box 1500

Huntsville, AL 35807-3801

## **Display Services**

Scope of Work # SW-IM-06-03.

01 APR 03

## SCOPE OF WORK

### DISPLAY SERVICES

#### 1.0 INTRODUCTION

The U.S. Army Space and Missile Defense Command (USASMDC) has the requirement to provide at various locations and times, clear, concise, accurate and understandable depictions of various aspects of its ongoing missions, function, tasks, technical efforts, historical commentary, and Command status. Messages shall be communicated in the form of displays utilizing various media and techniques which are tailored to the specific circumstance. These messages and specific information will be conveyed to various audiences which may include people from other government agencies, industry, allies, educational institutions and the general public. Locations may include government, industry, and military meetings, technical trade shows, symposiums, and conferences held throughout the United States, and Internationally. Each display will be unique; most will be prepared as traveling displays while others will be prepared for permanent installation in a government facility.

#### 2.0 GENERAL

The contractor shall provide complete display services. This includes providing displays and transporting and operating the displays as described in this Scope of Work, henceforth identified as the SOW. A display is defined as the facade and superstructure, ancillary structures such as pedestals, carpets, and signage. Displays may also include associated materials, described in this SOW, which are not

necessarily a permanent part of the display and may change or develop from one show to another.

2.1 Visits to the government facility for meetings to deliver designs, or displays for acceptance will be accomplished during government working hours (0800-1630), unless otherwise specified by the Technical Directive, (TD). Display operations may require travel time on weekends and holidays.

2.2 All work shall be performed in response to TD's, issued by the Government's Contracting Officer's Technical Monitor (TM). Notice of each display requirement may be provided orally with confirming written technical directive provided prior to commencement of each phase of the project. Each display project shall be divided into six (6) specific requirement phases, A-F, listed below and described in detail in SOW, paragraph 3.

- A - Preliminary Concept Definition
- B - Detailed Final Design
- C - Fabrication
- D - Maintenance and Updates
- E - Storage
- F - Delivery and Operation

For each display project, the TM will issue TD's requesting the contractor to perform all six (6) phases or select only those phases which are required. Delivery date shall be determined by the government. Project milestones shall be proposed by the contractor and approved by the TM.

2.3 The contractor shall furnish all management, administration, labor, data, supplies, material, tools, vehicles, equipment, and



facilities necessary to perform the display services set forth in SOW, paragraph 3.

2.4 Display structures purchased or created under the contract shall be either those available commercially, or fabricated by the contractor, or combination thereof, as approved by the TM.

2.5 Each display shall be one cohesive unit and utilize high quality, large photographs, original art, graphics, signage, lighting, video or computer graphic programs, and promotional materials which are attention getting and convey the message in an appropriate manner. All design elements, colors, and type styles must be tailored to enhance the impact of the message.

2.6 The deliverable items provided under this contract may include but are not limited to; display booths, stands and backdrops; carpet and furnishings; tools and electronic equipment; original art work, photographic prints and signage; video tape programs, interactive video, animation sequences, computer graphics, virtual reality demos, music or other audio effects; printed materials or promotional items; and scale models.

2.6.1 For both static and traveling displays the contractor shall provide adequate electrical support and arrange for electrical installation and hookup of lighting, video components, computers, and other electrical equipment at the installation site. The contractor shall insure continual operation of all electrical equipment which is part of the display.

2.6.2 For both static and traveling displays the contractor shall consider security for display equipment and models if the display will be used in an area, such as a shopping center, where it will be exposed

to large numbers of people or where it will be left unattended for periods of time. Security will be accomplished by providing locking storage areas for tools and supplies within the display structure. Also electrical equipment will be operated from enclosed areas of the display; models will be viewed inside clear plastic enclosures.

2.6.3. The design of permanently mounted displays (wall-mounted or free-standing) will be of a static configuration as opposed to traveling displays which must be flexible in design. The contractor shall ship or transport the displays and install them.

2.6.3.1 The design of traveling displays shall be flexible in size and shape so displays may be reconfigured for the various exhibit locations. The designs may include the use of audio-visual and computer equipment. Emphasis will be placed on the use of lightweight materials, to reduce shipping and drayage costs. All traveling display designs will include a quick and cost-effective method of changing graphics to appeal to a specific audience.

2.6.4 All displays must be high quality and constructed with tough, durable material (i.e.; chip and scratch resistant which will hold up through continual cycles of packing, shipping, unpacking, set-up, tear-down, repacking, returning to storage). The display shall be constructed in a manner which will allow disassembly and packing into sturdy, Air Transport Association of America (ATA) - approved, or equivalent, shipping containers. Containers shall provide secure storage for all display components. The maximum size of a display, when packed and readied for shipment, will be no larger than one which would fit into a 48'- 52' moving van. The contractor shall ensure that all shipping containers have adequate provisions for lifting and are marked with information such as gross weight and lifting requirements as necessary.

2.6.4.1 Each concept shall minimize the need for assembly and disassembly hardware and tools. The display will be easily transportable and easily reconfigured with minimum manpower or special equipment requirements. Setup time should not exceed 20 hours. This time will not count loading and unloading time.

2.6.4.2 Displays which are permanently installed, shall be shipped or transported by the contractor. The contractor shall accomplish installation with or without government supervision, shall arrange and supervise contract labor, and shall arrange for all necessary services, (i.e. dock time, electrical requirements, drayage or disposal of shipping crates).

2.6.4.3 Displays which are in an active travel status, shall be reconfigured as necessary by the contractor to suit different exhibit or show locations. The contractor shall complete and file all necessary show forms, order ancillary at-show materials, organize and pack display materials for shipment, arrange for shipping or transport, load the exhibit onto the carrier, and transport and accompany display to remote locations. At the specified show location, the contractor shall manage set-up and installation of display, audio-visual equipment and scale models with or without government supervision. The contractor shall arrange and supervise contract labor, arrange all necessary show services, (i.e. dock time, electrical requirements, drayage or storage of equipment and packing cases). The contractor shall remain on-site to insure the proper functioning of the display, shall make all needed on-site repairs, and shall provide all needed supplies for complete exhibit operations. The contractor shall not be required to represent the government, or to answer the public's questions, about the display or display messages. At the conclusion of

the event, the contractor shall disassemble, repack, transport, and return the display materials to storage.

### 3.0 REQUIREMENTS FOR DISPLAY SERVICES

3.1 Preliminary Concept Definition (Phase A). Based on information provided by the TM, the contractor shall develop preliminary messages or themes for the display project. After the final message or theme is selected by the TM, the contractor shall prepare preliminary design concepts and strategies. The contractor will show how various display elements could be designed, integrated, and configured, to communicate the desired message to include, but not limited to, the following:

3.1.1 Concepts will include design alternatives (two to five) in the form of scale drawings, two- and three-dimensional computer generated, white or blank models of proposed display designs, sketches of art work with equipment and lighting specifications, and material and color samples.

3.1.2 The concept shall include options for using video or other programs or demonstrations, as required.

3.1.3 The concept shall include options for using appropriate promotional materials to augment the display imagery and messages to include brochures, leaflets, fact sheets, posters, lithographs, and other promotional items.

3.1.4 The concept definition effort shall include a cost estimate for all of the phases of display production as directed in the TD. The contractor shall prepare these separate cost estimates for each of the

design options ordered. The following further defines these cost estimates:

3.1.4.1 The estimate for each Phase (except Phase E - Storage) shall include a labor cost summary with a description of the work to be performed, a designation of the labor categories that will perform the work, the estimated number of hours, and the cost for each category.

3.1.4.2 The estimate for Phase C (Fabrication) and Phase D (Maintenance and Updates) shall include a cost estimate for materials. The contractor shall list materials with the estimated quantity and cost of each.

3.1.4.3 The estimate for Phase E (Storage) shall include the estimated number of cubic feet needed to store the exhibits. Estimate to be based on a minimum of 11,000 cubic ft., a value which currently represents the amount of space required to store the existing exhibits currently in inventory.

3.1.4.4 The estimate for Phase F (Delivery of Display and Operation) shall include estimates for the cost for the delivery, set-up, and operations, of the display at all local and non-local events specified by the TM. The estimate shall include a description of the activity, and the category of labor expected to perform the delivery or operation and the number of hours required to complete the requirements defined by the TM. Types of labor activities performed in conjunction with the operation of the display may include, but are not limited to, planning/arrangements, local display transport, non-local display transport, event labor, drayage, per diem, lodging, and travel/transportation costs.

3.2 The TM shall indicate in writing approval of Phase A with a TD to proceed with Detailed Final Design (Phase B). After the TM approval of preliminary concept, the contractor will provide a final display design to include, but not limited to, the following:

3.2.1 The contractor shall provide a detailed drawing or a scale model of the display configuration with drawings or color composites of proposed art work, photographs, signage and text styles as required by the government.

3.2.2 The contractor shall provide a complete draft of the script for video programs; story boards for animation sequences; and script/diagrams of screens for graphic or interactive graphic presentations as required by the TM.

3.2.3 The contractor shall provide full color drawings and layout of graphics, photographs, and text to be used in any printed materials in the form of proof copy. The contractor shall provide detailed drawings or other representation of promotional items as required by the government.

3.2.4 Display materials must be approved, prior to purchase or lease, by the TM. All informational materials, including photographs, art work, video scripts, printed and promotion materials, must be approved by the TM and cleared for public release prior to fabrication, printing or production. The TM will arrange for the materials to receive this clearance by the government Public Affairs and Security offices. Once the information has been cleared for public release, the TM will notify the contractor of this clearance with a written order to proceed with Fabrication (Phase C). Once information has been cleared by the Command Public Affairs Office; PAO, it does not have to be

cleared again for later use if it is used in its original cleared context.

3.3 Display Fabrication (Phase C) shall not commence until approval of Phase B and clearance for public release of the final design and content of display and associated materials by the government. Typical materials may include but are not limited to plywood, hinges and locks, adhesives and resins, masonite, plexi-sheets, lighting fixtures, rheostats, wiring and accessories, laminate, fiberglass, structural foam; for storage containers, carpet, paint, computer-cut vinyl letters, crate materials, tools and cleaning materials; to travel with exhibit, crate materials, plastic panels, shipping for photos and materials, and photo print mounting. The contractor shall schedule regular in-process reviews for the TM to monitor the progress and approve various stages of fabrication.

3.3.1 The contractor will fabricate all materials which conform to the representations which were approved in Phase B, to include, but not limited to, the following:

3.3.1.1 The contractor shall produce a completed display structure including electrical components, art work, photographs, and signage, by providing the necessary materials and support services required.

3.3.1.2 The contractor may be required to produce completed videos and interactive computer presentations and video or computer support services for specific displays.

3.3.1.3 The contractor may be required to produce promotional materials and printing support services for specific displays.

3.3.2 The display shall be delivered for acceptance as described in paragraph 3.6.1. Acceptance will include complete assembly, demonstration, and operation of the finished display. The contractor will demonstrate to TM that all requirements have been met and the display is fully functional.

3.3.2.1 The contractor shall demonstrate the methods required to assemble, disassemble and operate the display and all of its subsystems (video, audio, computer, demos, lighting, etc.). The contractor shall also provide as part of the display, a concise set of instructions that pictorially describes the assembly and the disassembly of the display.

3.3.2.2 The TM may elect to inspect and test all work called for by a TD. The TM may choose to visit the contractor's facilities to review progress pertaining to the requirements outlined in the TD. The contractor shall furnish all reasonable assistance for the safety of visitors during inspections on the contractor's premises. The TM shall perform inspections in a manner that will not unduly delay the work.

3.3.3 Upon final approval of a video tape, CD, or DVD, the contractor will deliver a master file and copies of the medium. Quantities for copies, as directed by the TM. These copies will contain either single or multiple dubs in a continuous loop.

3.3.4 Upon final approval of the promotional materials, the contractor will secure or produce promotional items in a quantity of not greater than five hundred (500) copies. The master may be a film negative or digital printing file as determined by the TM and will be maintained by the contractor.

3.4 Display Maintenance and Update (Phase D). The contractor shall provide the following services:



3.4.1 The contractor shall maintain the display in an operating condition equal to the condition at the time display was accepted by the TM.

3.4.2 The contractor shall provide ongoing support as needed to keep the display updated and in good condition. Updates will include, but not be limited to, new art work, photographs, text, audio, video, or printed materials. Additions or modifications to an existing display structure or display elements constitute an update. Reconfiguration of the display to fit into varying-sized display spaces is considered part of display operation and is not an update.

3.5 Display Storage (Phase E). The contractor shall store the display and all associated materials when not in use. The display shall be stored at a location which is fully accessible should any of the display items be needed at short notice.

3.6 Display Delivery and Operation (Phase F). The contractor will provide the resources to coordinate the necessary arrangements for complete display operations. These include, but are not limited to the following:

3.6.1 The completed display will be delivered, for final acceptance, to USASSDC at 106 Wynn Drive, Huntsville, AL unless directed otherwise. Delivery will be made as directed in TD by the TM and visiting Contractor personnel shall comply with all applicable government security requirements.

#### 4.0 OTHER REQUIREMENTS

Upon completion of the contract, the contractor shall fully account for and deliver to the TM all display elements, shipping containers, supporting tools and equipment, computer disks and paper files, as well as any other materials that have been purchased or created under the contract.

## 5.0 DATA REQUIREMENTS

### 5.1 DATA AND REPORTS

The contractor shall submit data and reports in accordance with the DD 1423 (CDRL) attached to the contract. The contractor shall present briefings of contract work at the direction of the TM.

### 5.2 DELIVERY

All media submitted to the TM under this contract in the form of automated information system (AIS) media (e.g., diskette, CD's, DVD's, tapes, etc.) shall be free of viruses that could cause damage, disruption, or degradation of the AIS. The contractor shall test such media for viruses prior to delivery. All subcontracts shall include this requirement at any tier when the data to be delivered is in the form of AIS media.

## 6.0 CONTROL OF TECHNICAL AND OPERATIONAL INFORMATION AND DATA

All contractor documents in support of this requirement shall be reviewed and marked in accordance with DOD Directive 5230.24, Distribution Statements on Technical Documents, and MIL STD 1806.

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WAIS Document Retrieval 94-2007 AL, HUNTSVILLE  
DASG60-03-R-0010

06/04/02

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WASHINGTON D.C. 20210William W. Gross  
DirectorDivision of  
Wage DeterminationsWage Determination No.: 1994-2007  
Revision No.: 23  
Date of Last Revision: 05/28/2002

States: Alabama, Tennessee

Area: Alabama Counties of Colbert, Franklin, Jackson, Lauderdale, Lawrence,  
Limestone,  
Madison, Marion, Marshall, Morgan, Winston  
Tennessee Counties of Giles, Lawrence, Lincoln, Moore, Wayne

\*\*Fringe Benefits Required Follow the Occupational Listing\*\*

OCCUPATION TITLE	MINIMUM WAGE RATE
Administrative Support and Clerical Occupations	
Accounting Clerk I	8.76
Accounting Clerk II	10.55
Accounting Clerk III	13.41
Accounting Clerk IV	16.77
Court Reporter	13.58
Dispatcher, Motor Vehicle	14.03
Document Preparation Clerk	12.18
Duplicating Machine Operator	12.18
Film/Tape Librarian	10.72
General Clerk I	8.65
General Clerk II	9.73
General Clerk III	10.42
General Clerk IV	12.19
Housing Referral Assistant	16.22
Key Entry Operator I	9.37
Key Entry Operator II	11.16
Messenger (Courier)	7.39
Order Clerk I	10.22
Order Clerk II	13.88
Personnel Assistant (Employment) I	9.17
Personnel Assistant (Employment) II	12.09
Personnel Assistant (Employment) III	13.51
Personnel Assistant (Employment) IV	13.73
Production Control Clerk	16.25
Rental Clerk	10.72
Scheduler, Maintenance	11.51
Secretary I	11.51
Secretary II	13.58
Secretary III	16.22
Secretary IV	19.75
Secretary V	21.92
Service Order Dispatcher	11.89
Stenographer I	13.44
Stenographer II	15.24
Supply Technician	19.75
Survey Worker (Interviewer)	13.58
Switchboard Operator-Receptionist	8.57
Test Examiner	13.58

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Test Proctor	
Travel Clerk I	13.58
Travel Clerk II	8.22
Travel Clerk III	8.71
Word Processor I	9.29
Word Processor II	11.10
Word Processor III	12.46
Automatic Data Processing Occupations	13.93
Computer Data Librarian	
Computer Operator I	9.81
Computer Operator II	12.14
Computer Operator III	13.55
Computer Operator IV	17.17
Computer Operator V	17.91
Computer Programmer I (1)	19.83
Computer Programmer II (1)	16.22
Computer Programmer III (1)	19.10
Computer Programmer IV (1)	22.79
Computer Systems Analyst I (1)	27.57
Computer Systems Analyst II (1)	24.64
Computer Systems Analyst III (1)	27.62
Peripheral Equipment Operator	27.62
Automotive Service Occupations	12.14
Automotive Body Repairer, Fiberglass	
Automotive Glass Installer	17.50
Automotive Worker	15.94
Electrician, Automotive	15.94
Mobile Equipment Servicer	16.73
Motor Equipment Metal Mechanic	14.45
Motor Equipment Metal Worker	17.50
Motor Vehicle Mechanic	15.94
Motor Vehicle Mechanic Helper	15.98
Motor Vehicle Upholstery Worker	12.52
Motor Vehicle Wrecker	15.22
Painter, Automotive	15.94
Radiator Repair Specialist	15.28
Tire Repairer	15.94
Transmission Repair Specialist	12.75
Food Preparation and Service Occupations	17.50
Baker	
Cook I	9.96
Cook II	7.87
Dishwasher	8.85
Food Service Worker	6.95
Meat Cutter	6.95
Waiter/waitress	9.99
Furniture Maintenance and Repair Occupations	6.82
Electrostatic Spray Painter	
Furniture Handler	17.56
Furniture Refinisher	13.94
Furniture Refinisher Helper	17.56
Furniture Repairer, Minor	14.41
Upholsterer	15.98
General Services and Support Occupations	17.56
Cleaner, Vehicles	
Elevator Operator	7.99
Gardener	8.06
House Keeping Aid I	10.22
House Keeping Aid II	7.13
Janitor	8.62
Laborer, Grounds Maintenance	8.06
Maid or Houseman	8.44
Pest Controller	6.63
	9.09

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Refuse Collector	8.44
Tractor Operator	10.19
Window Cleaner	8.24
Health Occupations	
Dental Assistant	10.98
Emergency Medical Technician (EMT)/Paramedic/Ambulance Driver	11.88
Licensed Practical Nurse I	11.17
Licensed Practical Nurse II	12.54
Licensed Practical Nurse III	14.04
Medical Assistant	9.81
Medical Laboratory Technician	12.53
Medical Record Clerk	11.28
Medical Record Technician	13.60
Nursing Assistant I	7.75
Nursing Assistant II	8.71
Nursing Assistant III	9.50
Nursing Assistant IV	10.66
Pharmacy Technician	12.24
Phlebotomist	11.28
Registered Nurse I	14.90
Registered Nurse II	18.23
Registered Nurse II, Specialist	18.23
Registered Nurse III	22.05
Registered Nurse III, Anesthetist	22.05
Registered Nurse IV	26.43
Information and Arts Occupations	
Audiovisual Librarian	21.15
Exhibits Specialist I	17.77
Exhibits Specialist II	21.76
Exhibits Specialist III	26.45
Illustrator I	17.77
Illustrator II	21.76
Illustrator III	26.45
Librarian	19.27
Library Technician	14.28
Photographer I	13.01
Photographer II	15.02
Photographer III	17.99
Photographer IV	22.00
Photographer V	26.70
Laundry, Dry Cleaning, Pressing and Related Occupations	
Assembler	6.94
Counter Attendant	6.94
Dry Cleaner	7.29
Finisher, Flatwork, Machine	6.94
Presser, Hand	6.94
Presser, Machine, Drycleaning	6.94
Presser, Machine, Shirts	6.94
Presser, Machine, Wearing Apparel, Laundry	7.32
Sewing Machine Operator	7.64
Tailor	8.36
Washer, Machine	7.46
Machine Tool Operation and Repair Occupations	
Machine-Tool Operator (Toolroom)	18.68
Tool and Die Maker	22.78
Material Handling and Packing Occupations	
Forklift Operator	14.82
Fuel Distribution System Operator	16.43
Material Coordinator	16.25
Material Expediter	16.25
Material Handling Laborer	9.58
Order Filler	10.87
Production Line Worker (Food Processing)	11.57

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Shipping Packer	10.89
Shipping/Receiving Clerk	10.51
Stock Clerk (Shelf Stocker; Store Worker II)	12.11
Store Worker I	8.93
Tools and Parts Attendant	12.44
Warehouse Specialist	11.57
<b>Mechanics and Maintenance and Repair Occupations</b>	
Aircraft Mechanic	18.38
Aircraft Mechanic Helper	14.41
Aircraft Quality Control Inspector	20.21
Aircraft Servicer	15.98
Aircraft Worker	16.75
Appliance Mechanic	17.56
Bicycle Repairer	14.66
Cable Splicer	18.38
Carpenter, Maintenance	17.56
Carpet Layer	16.75
Electrician, Maintenance	20.61
Electronics Technician, Maintenance I	14.82
Electronics Technician, Maintenance II	25.55
Electronics Technician, Maintenance III	26.62
Fabric Worker	15.98
Fire Alarm System Mechanic	18.38
Fire Extinguisher Repairer	15.72
Fuel Distribution System Mechanic	18.38
General Maintenance Worker	16.43
Heating, Refrigeration and Air Conditioning Mechanic	18.38
Heavy Equipment Mechanic	18.38
Heavy Equipment Operator	17.87
Instrument Mechanic	18.38
Laborer	8.89
Locksmith	17.56
Machinery Maintenance Mechanic	20.72
Machinist, Maintenance	16.92
Maintenance Trades Helper	14.41
Millwright	18.38
Office Appliance Repairer	17.56
Painter, Aircraft	17.56
Painter, Maintenance	17.56
Pipefitter, Maintenance	18.38
Plumber, Maintenance	17.56
Pneudraulic Systems Mechanic	18.38
Rigger	18.38
Scale Mechanic	16.75
Sheet-Metal Worker, Maintenance	18.38
Small Engine Mechanic	16.75
Telecommunication Mechanic I	18.38
Telecommunication Mechanic II	20.21
Telephone Lineman	18.38
Welder, Combination, Maintenance	18.38
Well Driller	18.38
Woodcraft Worker	18.38
Woodworker	16.43
<b>Miscellaneous Occupations</b>	
Animal Caretaker	7.19
Carnival Equipment Operator	7.70
Carnival Equipment Repairer	8.09
Carnival Worker	6.38
Cashier	6.50
Desk Clerk	6.90
Embalmer	18.01
Lifeguard	9.46
Mortician	17.26

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Park Attendant (Aide)	10.21
Photofinishing Worker (Photo Lab Tech., Darkroom Tech)	8.87
Recreation Specialist	11.14
Recycling Worker	10.10
Sales Clerk	8.87
School Crossing Guard (Crosswalk Attendant)	7.12
Sport Official	8.87
Survey Party Chief (Chief of Party)	12.11
Surveying Aide	7.45
Surveying Technician (Instr. Person/Surveyor Asst./Instr.)	10.21
Swimming Pool Operator	9.72
Vending Machine Attendant	8.48
Vending Machine Repairer	9.72
Vending Machine Repairer Helper	8.48
Personal Needs Occupations	
Child Care Attendant	6.95
Child Care Center Clerk	8.68
Chore Aid	6.82
Homemaker	11.01
Plant and System Operation Occupations	
Boiler Tender	18.86
Sewage Plant Operator	17.56
Stationary Engineer	18.86
Ventilation Equipment Tender	14.41
Water Treatment Plant Operator	17.56
Protective Service Occupations	
Alarm Monitor	11.60
Corrections Officer	12.80
Court Security Officer	10.88
Detention Officer	12.80
Firefighter	9.62
Guard I	8.73
Guard II	12.11
Police Officer	15.64
Stevedoring/Longshoremen Occupations	
Blocker and Bracer	13.48
Hatch Tender	13.48
Line Handler	13.68
Stevedore I	11.66
Stevedore II	14.13
Technical Occupations	
Air Traffic Control Specialist, Center (2)	28.33
Air Traffic Control Specialist, Station (2)	19.54
Air Traffic Control Specialist, Terminal (2)	21.51
Archeological Technician I	15.69
Archeological Technician II	17.56
Archeological Technician III	21.76
Cartographic Technician	22.32
Civil Engineering Technician	20.75
Computer Based Training (CBT) Specialist/ Instructor	24.00
Drafter I	13.99
Drafter II	15.69
Drafter III	17.77
Drafter IV	21.76
Engineering Technician I	12.79
Engineering Technician II	15.89
Engineering Technician III	19.09
Engineering Technician IV	26.34
Engineering Technician V	30.74
Engineering Technician VI	37.17
Environmental Technician	16.67
Flight Simulator/Instructor (Pilot)	26.49
Graphic Artist	19.39



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Instructor	19.27
Laboratory Technician	14.09
Mathematical Technician	21.61
Paralegal/Legal Assistant I	13.59
Paralegal/Legal Assistant II	17.18
Paralegal/Legal Assistant III	20.96
Paralegal/Legal Assistant IV	25.37
Photooptics Technician	19.16
Technical Writer	23.07
Unexploded (UXO) Safety Escort	19.14
Unexploded (UXO) Sweep Personnel	19.14
Unexploded Ordnance (UXO) Technician I	19.14
Unexploded Ordnance (UXO) Technician II	23.15
Unexploded Ordnance (UXO) Technician III	27.74
Weather Observer, Combined Upper Air and Surface Programs (3)	16.72
Weather Observer, Senior (3)	17.08
Weather Observer, Upper Air (3)	16.72
Transportation/ Mobile Equipment Operation Occupations	
Bus Driver	12.67
Parking and Lot Attendant	8.18
Shuttle Bus Driver	11.97
Taxi Driver	9.91
Truckdriver, Heavy Truck	14.71
Truckdriver, Light Truck	11.97
Truckdriver, Medium Truck	13.56
Truckdriver, Tractor-Trailer	15.01

## ALL OCCUPATIONS LISTED ABOVE RECEIVE THE FOLLOWING BENEFITS:

HEALTH & WELFARE: \$2.15 an hour or \$86.00 a week or \$372.67 a month

VACATION: 2 weeks paid vacation after 1 year of service with a contractor or successor; 3 weeks after 10 years, and 4 after 20 years. Length of service includes the whole span of continuous service with the present contractor or successor, wherever employed, and with the predecessor contractors in the performance of similar work at the same Federal facility. (Reg. 29 CFR 4.173)

HOLIDAYS: A minimum of ten paid holidays per year: New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day. (A contractor may substitute for any of the named holidays another day off with pay in accordance with a plan communicated to the employees involved.) (See 29 CFR 4.174)

THE OCCUPATIONS WHICH HAVE PARENTHESES AFTER THEM RECEIVE THE FOLLOWING BENEFITS (as numbered):

- 1) Does not apply to employees employed in a bona fide executive, administrative, or professional capacity as defined and delineated in 29 CFR 541. (See CFR 4.156)
- 2) APPLICABLE TO AIR TRAFFIC CONTROLLERS ONLY - NIGHT DIFFERENTIAL: An employee is entitled to pay for all work performed between the hours of 6:00 P.M. and 6:00 A.M.

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at the rate of basic pay plus a night pay differential amounting to 10 percent of the rate of basic pay.

3) WEATHER OBSERVERS - NIGHT PAY & SUNDAY PAY: If you work at night as part of a regular tour of duty, you will earn a night differential and receive an additional 10% of basic pay for any hours worked between 6pm and 6am. If you are a full-time employed (40 hours a week) and Sunday is part of your regularly scheduled workweek, you are paid at your rate of basic pay plus a Sunday premium of 25% of your basic rate for each hour of Sunday work which is not overtime (i.e. occasional work on Sunday outside the normal tour of duty is considered overtime work).

HAZARDOUS PAY DIFFERENTIAL: An 8 percent differential is applicable to employees employed in a position that represents a high degree of hazard when working with or in close proximity to ordnance, explosives, and incendiary materials. This includes work such as screening, blending, dying, mixing, and pressing of sensitive ordnance, explosives, and pyrotechnic compositions such as lead azide, black powder and photoflash powder. All dry-house activities involving propellants or explosives. Demilitarization, renovation, demolition, and maintenance operations on sensitive ordnance, explosives and incendiary materials. All operations involving regrading and cleaning of artillery ranges.

A 4 percent differential is applicable to employees employed in a position that represents a low degree of hazard when working with, or in close proximity to ordnance, (or employees possibly adjacent to) explosives and incendiary materials which involves potential injury such as laceration of hands, face, or arms of the employee engaged in the operation, irritation of the skin, minor burns and the like; minimal damage to immediate or adjacent work area or equipment being used. All operations involving, unloading, storage, and hauling of ordnance, explosive, and incendiary ordnance material other than small arms ammunition. These differentials are only applicable to work that has been specifically designated by the agency for ordnance, explosives, and incendiary material differential pay.

**\*\* UNIFORM ALLOWANCE \*\***

If employees are required to wear uniforms in the performance of this contract (either by the terms of the Government contract, by the employer, by the state or local law, etc.), the cost of furnishing such uniforms and maintaining (by laundering or dry cleaning) such uniforms is an expense that may not be borne by an employee where such cost reduces

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the hourly rate below that required by the wage determination. The Department of Labor will accept payment in accordance with the following standards as compliance:

The contractor or subcontractor is required to furnish all employees with an adequate number of uniforms without cost or to reimburse employees for the actual cost of the uniforms. In addition, where uniform cleaning and maintenance is made the responsibility of the employee, all contractors and subcontractors subject to this wage determination shall (in the absence of a bona fide collective bargaining agreement providing for a different amount, or the furnishing of contrary affirmative proof as to the actual cost), reimburse all employees for such cleaning and maintenance at a rate of \$3.35 per week (or \$.67 cents per day). However, in those instances where the uniforms furnished are made of "wash and wear" materials, may be routinely washed and dried with other personal garments, and do not require any special treatment such as dry cleaning, daily washing, or commercial laundering in order to meet the cleanliness or appearance standards set by the terms of the Government contract, by the contractor, by law, or by the nature of the work, there is no requirement that employees be reimbursed for uniform maintenance costs.

**\*\* NOTES APPLYING TO THIS WAGE DETERMINATION \*\***

**Source of Occupational Title and Descriptions:**

The duties of employees under job titles listed are those described in the "Service Contract Act Directory of Occupations," Fourth Edition, January 1993, as amended by the Third Supplement, dated March 1997, unless otherwise indicated. This publication may be obtained from the Superintendent of Documents, at 202-783-3238, or by writing to the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Copies of specific job descriptions may also be obtained from the appropriate contracting officer.

REQUEST FOR AUTHORIZATION OF ADDITIONAL CLASSIFICATION AND WAGE RATE {Standard Form 1444 (SF 1444)}

**Conformance Process:**

The contracting officer shall require that any class of service employee which is not listed herein and which is to be employed under the contract (i.e., the work to be performed is not performed by any classification listed in the wage determination), be classified by the contractor so as to provide a reasonable relationship (i.e., appropriate level of skill comparison) between such unlisted classifications and the classifications

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listed in the wage determination. Such conformed classes of employees shall be paid the monetary wages and furnished the fringe benefits as are determined. Such conforming process shall be initiated by the contractor prior to the performance of contract work by such unlisted class(es) of employees. The conformed classification, wage rate, and/or fringe benefits shall be retroactive to the commencement date of the contract. {See Section 4.6 (C)(vi)} when multiple wage determinations are included in a contract, a separate SF 1444 should be prepared for each wage determination to which a class(es) is to be conformed.

The process for preparing a conformance request is as follows:

- 1) When preparing the bid, the contractor identifies the need for a conformed occupation(s) and computes a proposed rate(s).
- 2) After contract award, the contractor prepares a written report listing in order proposed classification title(s), a Federal grade equivalency (FGE) for each proposed classification(s), job description(s), and rationale for proposed wage rate(s), including information regarding the agreement or disagreement of the authorized representative of the employees involved, or where there is no authorized representative, the employees themselves. This report should be submitted to the contracting officer no later than 30 days after such unlisted class(es) of employees performs any contract work.
- 3) The contracting officer reviews the proposed action and promptly submits a report of the action, together with the agency's recommendations and pertinent information including the position of the contractor and the employees, to the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, for review. (See section 4.6(b)(2) of Regulations 29 CFR Part 4).
- 4) Within 30 days of receipt, the wage and hour division approves, modifies, or disapproves the action via transmittal to the agency contracting officer, or notifies the contracting officer that additional time will be required to process the request.
- 5) The contracting officer transmits the wage and hour decision to the contractor.
- 6) The contractor informs the affected employees.

Information required by the Regulations must be submitted on SF 1444 or bond paper.

When preparing a conformance request, the "Service Contract Act Directory of Occupations" (the Directory) should be used to compare job definitions to insure that duties requested are not performed by a classification already listed in the wage determination. Remember, it is not the job title, but the required tasks that determine whether a class is included

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in an established wage determination. Conformances may not be used to artificially  
split,  
combine, or subdivide classifications listed in the wage determination.

## PAST PERFORMANCE QUESTIONNAIRE

## I. CONTRACT IDENTIFICATION

A. CONTRACTOR \_\_\_\_\_

B. CONTRACT NUMBER \_\_\_\_\_

C. CONTRACT TYPE \_\_\_\_\_

COMPETITIVE ( ) YES ( ) NO

FOLLOW-ON ( ) YES ( ) NO

D. PERIOD OF PERFORMANCE \_\_\_\_\_

ESTIMATED  
COSTFEETOTAL  
VALUE

E. INITIAL CONTRACT COST \_\_\_\_\_

F. CURRENT CONTRACT COST \_\_\_\_\_

G. PRODUCT DESCRIPTION  
AND/OR SERVICE PROVIDED:

---



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---

## II. AGENCY IDENTIFICATION

A. PROCURING CONTRACTING OFFICER'S NAME, OFFICE SYMBOL,  
TELEPHONE NUMBER, AND FAX NUMBER

---



---

B. TECHNICAL POINT OF CONTACT'S NAME, OFFICE SYMBOL, TELEPHONE  
NUMBER, AND FAX NUMBER

---



---

## C. CONTRACTING ACTIVITY AND ADDRESS

---

---

D. GEOGRAPHIC DISTRIBUTION OF SERVICES UNDER THIS CONTRACT  
I.E. LOCAL, NATIONWIDE, WORLDWIDE

---

## E. NUMBER OF LOCATIONS SERVICED BY THIS CONTRACT \_\_\_\_\_

## III. EVALUATION

## A. PERFORMANCE HISTORY

1. To what extent did the contractor adhere to contract delivery schedules?

Considerably surpassed minimum requirements \_\_\_\_\_

Exceeded minimum requirements \_\_\_\_\_

Met minimum requirements \_\_\_\_\_

Less than minimum requirements \_\_\_\_\_

Comment: \_\_\_\_\_

2. To what extent did the contractor submit required reports and documentation in a timely manner?

Considerably surpassed minimum requirements \_\_\_\_\_

Exceeded minimum requirements \_\_\_\_\_

Met minimum requirements \_\_\_\_\_

Less than minimum requirements \_\_\_\_\_

Comment: \_\_\_\_\_

3. To what extent were the contractor's reports and documentation accurate and complete?

Considerably surpassed minimum requirements \_\_\_\_\_

Exceeded minimum requirements \_\_\_\_\_

Met minimum requirements \_\_\_\_\_

Less than minimum requirements \_\_\_\_\_

Comment: \_\_\_\_\_

---

4. To what extent was the contractor able to solve contract performance problems without extensive guidance from government counterparts?

Considerably successful \_\_\_\_\_

Generally successful \_\_\_\_\_

Little success \_\_\_\_\_

No success \_\_\_\_\_

Comment: \_\_\_\_\_

---

5. To what extent did the contractor display initiative in meeting requirements?

Displayed considerable initiative \_\_\_\_\_

Displayed some initiative \_\_\_\_\_

Displayed little initiative \_\_\_\_\_

Displayed no initiative \_\_\_\_\_

Comment: \_\_\_\_\_

---

6. Did the contractor commit adequate resources in timely fashion to the contract to meet the requirement and to successfully solve problems?

Provided abundant resources \_\_\_\_\_

Provided sufficient resources \_\_\_\_\_



Provided minimal resources \_\_\_\_\_

Provided insufficient resources \_\_\_\_\_

Comment: \_\_\_\_\_

---

7. To what extent did the contractor submit change orders and other required proposals in a timely manner?

Considerably surpassed minimum requirements \_\_\_\_\_

Exceeded minimum requirements \_\_\_\_\_

Met minimum requirements \_\_\_\_\_

Less than minimum requirements \_\_\_\_\_

Comment: \_\_\_\_\_

---

8. To what extent did the contractor respond positively and promptly to technical directions, contract change orders, etc.?

Considerably surpassed minimum requirements \_\_\_\_\_

Exceeded minimum requirements \_\_\_\_\_

Met minimum requirements \_\_\_\_\_

Less than minimum requirements \_\_\_\_\_

Comment: \_\_\_\_\_

---

9. To what extent was the contractor's problem tracking/reporting documentation timely, accurate and or appropriate content?

Considerably surpassed minimum requirements \_\_\_\_\_

Exceeded minimum requirements \_\_\_\_\_

Met minimum requirements \_\_\_\_\_

Less than minimum requirements \_\_\_\_\_

Comment: \_\_\_\_\_

10. To what extent was the contractor effective in interfacing with the Government's staff?

Extremely effective \_\_\_\_\_

Generally effective \_\_\_\_\_

Generally ineffective \_\_\_\_\_

Extremely ineffective \_\_\_\_\_

Comment: \_\_\_\_\_

#### B. TERMINATION HISTORY

11. Has this contract been partially or completely terminated for default or convenience?

\_\_\_\_\_ Yes \_\_\_\_\_ Default \_\_\_\_\_ Convenience

\_\_\_\_\_ No

If yes, explain (e.g., inability to meet cost, performance, or delivery schedule).

12. Are there any pending terminations?

\_\_\_\_\_ Yes \_\_\_\_\_ No

If yes, explain and indicate the status.

#### C. EXPERIENCE HISTORY

13. How effective has the contractor been in identifying user requirements?

Extremely effective \_\_\_\_\_

Generally effective \_\_\_\_\_

Generally ineffective \_\_\_\_\_

Extremely ineffective \_\_\_\_\_

Comment: \_\_\_\_\_

14. To what extent did the contractor coordinate, integrate, and provide for effective subcontractor management?

Considerably surpassed minimum requirements \_\_\_\_\_

Exceeded minimum requirements \_\_\_\_\_

Met minimum requirements \_\_\_\_\_

Less than minimum requirements \_\_\_\_\_

Comment: \_\_\_\_\_

15. To what extent did the contractor provide timely technical assistance, both on-site and off-site, when responding to problems encountered in the field?

Considerably surpassed minimum requirements \_\_\_\_\_

Exceeded minimum requirements \_\_\_\_\_

Met minimum requirements \_\_\_\_\_

Less than minimum requirements \_\_\_\_\_

Comment: \_\_\_\_\_

#### D. COST MANAGEMENT

16. To what extent did the contractor meet the proposed cost estimates?

Less than estimated cost \_\_\_\_\_

Comparatively equal to estimate \_\_\_\_\_

Exceeded the costs \_\_\_\_\_

Considerably surpassed estimate \_\_\_\_\_

Comment: \_\_\_\_\_

## **ATTACHMENT 2: SAMPLE SOLICITATION**



## **CHAPTER 2**

### **GOVERNMENT CONTRACT REVIEW**

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## **CHAPTER 2**

### **GOVERNMENT CONTRACT REVIEW**

#### **I. INTRODUCTION.**

- A. The key to successful contract review is to integrate yourself into the acquisition from the very beginning (proactive vs reactive lawyering).
- B. Every acquisition starts with *Acquisition Planning*. See, [FAR Part 7](#); [DFARS Part 207](#). Be a part of the *Acquisition Planning Team*. Establish a rapport with your supported contracting office / resource management office.
- C. Bottom Line: Be familiar with the acquisition!

#### **II. CONTRACT LEGAL REVIEWS.**

- A. Checklists.
  - 1. You/your legal office need to have checklists.
  - 2. If you do not have one, borrow one from another office.
- B. Example.
  - 1. See Attachment A. This is the most in-depth version of a contract review checklist that I have been able to locate. It was prepared by the Electronic Systems Command Staff Judge Advocate's Office at Hanscom Air Force Base.



2. You can see the entire set of checklists at:  
<https://centernet.hanscom.af.mil/JA/CRG/checklist.htmContent>.

### **III. WHAT'S IN A CONTRACT?**

A. Standard Procurement System (SPS).

B. Uniform Contract Format.

1. Divided into Four Parts.

- a. Part I – The Schedule: Sections A-H.

- b. Part II – Contract Clauses: Section I.

- c. Part III – List of Documents, Exhibits and other Attachments: Section J.

- d. Part IV – Representations and Instructions: Sections K-M.

2. Section A: Solicitation/Contract Form (SF 33).

Contains administrative information pertinent to the RFP (number, proposal due date, government points of contact, table of contents, etc.)

3. Section B: Supplies or Services and Prices/Cost.

Contains a brief description of the supplies and services and quantities required, the unit prices, and total prices. This description of supplies, services, quantities, and associated pricing is referred to and identified with a specific contract line item number (CLIN or CLINs).

4. Section C: Description/Specifications/Statement of Work.

Contains a more elaborate description of the items contained in Section B, and describes what is to be accomplished, but does not prescribe how the tasks are to be performed. Unless, of course, government uses performance specifications or a service contract where we describe what it is we want accomplished.

5. Section D: Packaging and Marking (Only for Supplies).

Contains specific information on requirements for packaging and marking of items to be delivered.

6. Section E: Inspection and Acceptance (IAW).

Contains information on how the government will inspect and conditions for acceptance of items and services to be delivered under the contract.

7. Section F: Deliveries or Performance.

Specifies the requirement for time, place, and method of delivery or performance for items and services to be delivered under the contract.

8. Section G: Contract Administration Data.

Contains accounting and appropriations data and required contract administration information and instructions.

9. Section H: Special Contract Requirements.

Contains contractual requirements that are not included in other parts of the contract, including special clauses that only pertain to that particular acquisition.

10. Section I: Contract Clauses.

Contains all clauses required by law or regulation. They are commonly referred to as “boilerplate” clauses because they are normally inserted into most contracts.

11. Section J: List of Attachments.

Contains or lists documents, attachments, or exhibits that are a material part of the contract. Some examples of these documents are the specifications, the statement of work (SOW) and the contract data requirements list (CDRL).

12. Section K: Representations, Certifications and other Statements of Offerors.

Contains representations, certifications, and other information required from each contractor. Some examples are: Procurement Integrity Certification, Small Business Certification, Place of Performance, and Ownership.

13. Section L: Instructions, Conditions and Notices to Offerors.

Tells the offerors what is to be provided in their proposal and how it should be formatted. It guides offerors in preparing their proposals, outlines what the government plans to buy, and emphasizes any government special interest items or constraints.

14. Section M: Evaluation Factors for Award.

Forms the basis for evaluating each offeror’s proposal. It informs offerors of the relative order of importance of assigned criteria so that an integrated assessment can be made of each offeror’s proposal.

## IV. FEDERAL ACQUISITION REGULATION (FAR) SYSTEM.

### A. Federal Acquisition Regulation (FAR).

1. The FAR became effective on 1 April 1984. The FAR replaced the Defense Acquisition Regulation (DAR), the Federal Procurement Regulation (FPR), and the NASA Procurement Regulation (NASAPR). [Note: you may also hear some “old-timers” refer to the Armed Services Procurement Regulation (or ASPR) – the ASPR went into effect in 1948 and remained in effect until it was replaced by the DAR in 1978.]
2. The General Services Administration has been tasked with the responsibility for publishing the FAR and any updates to it. [FAR 1.201-2](#).
3. Locating the FAR.
  - a. The Government Printing Office (GPO) previously printed periodic updates to the FAR in the form of Federal Acquisition Circulars (FAC). Effective 31 December 2000, the GPO no longer produces printed copies of the FACs or updated versions of the FAR. See [65 Fed. Reg. 56,452 \(18 September 2000\)](#).
  - b. Currently only electronic versions of the FAR and the FACs are available. The FAR is found at Chapter 1 of Title 48 of the Code of Federal Regulations (C.F.R.). Proposed and final changes to the FAR are published electronically in the Federal Register.
  - c. The official electronic version of the FAR (maintained by GSA) is available at <http://www.arnet.gov/far/> [Note: this site also permits you to sign up for an electronic notification of proposed and final changes to the FAR]. The Air Force FAR Site contains a very user-friendly version of the FAR as well as several supplements. It is found at: <http://farsite.hill.af.mil/>.

### B. Departmental and Agency Supplemental Regulations. [FAR Subpart 1.3](#).

1. Agencies are permitted to issue regulations that implement or supplement the FAR.

2. Most agencies have some form of supplemental regulation. The FAR requires these supplements to be published in Title 41 of the C.F.R. [FAR 1.303](#). The following chart shows the location within Title 41 for each of the respective agency supplementation:

<u>Chapter</u>	<u>Agency/Department</u>
2	Defense FAR Supplement (DFARS). The DFARS was completely revised in 1991. Available at each of the following sites: <a href="http://www.acq.osd.mil/dp/dars/dfars.html">http://www.acq.osd.mil/dp/dars/dfars.html</a> and <a href="http://farsite.hill.af.mil/VFDFARA.HTM">http://farsite.hill.af.mil/VFDFARA.HTM</a> .
3	Health and Human Services.
4	Agriculture.
5	General Services Administration Regulation (GSAR)
6	State.
7	Agency For International Development.
8	Veterans Affairs.
9	Department of Energy Acquisition Regulation (DEAR). Available at: <a href="http://farsite.hill.af.mil/vfdoea.htm/">http://farsite.hill.af.mil/vfdoea.htm/</a>
10	Treasury.
12	Transportation Acquisition Regulation (TAR).
13	Commerce.
14	Interior.
15	Environmental Protection Agency.
16	Office of Personnel Management.
17	NASA FAR Supplement (NFS). Available at: <a href="http://farsite.hill.af.mil/VFnasaa.HTM">http://farsite.hill.af.mil/VFnasaa.HTM</a> .
19	United States Information Agency.
22	Small Business Administration.
24	Housing And Urban Development.
25	National Science Foundation.
28	Justice.
29	Department of Labor.
35	Panama Canal Commission.
44	Federal Emergency Management Agency.

51	Army FAR Supplement (AFARS). Also available at: <a href="http://farsite.hill.af.mil/vfafara.htm">http://farsite.hill.af.mil/vfafara.htm</a> .
52	Navy Acquisition Procedures Supplement (NAPS). Also available at: <a href="http://farsite.hill.af.mil/vfnapsa.htm">http://farsite.hill.af.mil/vfnapsa.htm</a> .
53	Air Force FAR Supplement (AFFARS). Also available at: <a href="http://farsite.hill.af.mil/vfaffara.htm">http://farsite.hill.af.mil/vfaffara.htm</a> .
54	Defense Logistics Acquisition Regulation Supplement (DLAR).

C. Layout of the FAR.

1. The FAR is divided into eight (8) subchapters and fifty-three (53) parts. Parts are further divided into subparts, sections, and subsections.
2. The FAR organizational system applies to the FAR and all agency supplements to the FAR. See FAR 1.303.

<b>Subchapter A: General</b>	
Part 1:	Federal Acquisition Regulations System
Part 2:	Definitions of Words and Terms
Part 3:	Improper Business Practices and Personal Conflicts of Interest
Part 4:	Administrative Matters
<b>Subchapter B: Acquisition Planning</b>	
Part 5:	Publicizing Contract Actions
Part 6:	Competition Requirements
Part 7:	Acquisition Planning
Part 8:	Required Sources of Supplies and Services
Part 9:	Contractor Qualifications
Part 10:	Specifications, Standards, and Other Purchase Descriptions
Part 11:	Describing Agency Needs
Part 12:	Acquisition of Commercial Items.

### **Subchapter C: Contracting Methods and Contract Types**

- Part 13: Simplified Acquisition Procedures
- Part 14: Sealed Bidding
- Part 15: Contracting by Negotiation
- Part 16: Types of Contracts
- Part 17: Special Contracting Methods
- Part 18: [Reserved]

### **Subchapter D: Socioeconomic Programs**

- Part 19: Small Business Programs.
- Part 20: [Reserved]
- Part 21: [Reserved]
- Part 22: Application of Labor Law to Government Acquisitions
- Part 23: Environment, Conservation, Occupational Safety, and Drug-Free Workplace
- Part 24: Protection of Privacy and Freedom of Information
- Part 25: Foreign Acquisition
- Part 26: Other Socioeconomic Programs

### **Subchapter E: General Contracting Requirements**

- Part 27: Patents, Data, and Copyrights
- Part 28: Bonds and Insurance
- Part 29: Taxes
- Part 30: Cost Accounting Standards
- Part 31: Contract Cost Principles and Procedures
- Part 32: Contract Financing
- Part 33: Protests, Disputes, and Appeals

<b>Subchapter F: Special Categories of Contracting</b>	
Part 34:	Major System Acquisition
Part 35:	Research and Development Contracting
Part 36:	Construction and Architect-Engineer Contracts
Part 37:	Service Contracting
Part 38:	Federal Supply Schedule Contracting
Part 39:	Acquisition of Information Resources
Part 40:	[Reserved]
Part 41:	Acquisition of Utility Services.
<b>Subchapter G: Contract Management</b>	
Part 42:	Contract Administration
Part 43:	Contract Modifications
Part 44:	Subcontracting Policies and Procedures
Part 45:	Government Property
Part 46:	Quality Assurance
Part 47:	Transportation
Part 48:	Value Engineering
Part 49:	Termination of Contracts
Part 50:	Extraordinary Contractual Actions
Part 51:	Use of Government Sources by Contractors
<b>Subchapter H: Clauses and Forms</b>	
Part 52:	Solicitation Provisions and Contract Clauses
Part 53:	Forms
Appendix:	Cost Accounting Standards

3. Arrangement. The digits to the left of the decimal point represent the part number. The digits to the right of the decimal point AND to the left of the dash represent the subpart and section. The digits to the right of the dash represent the subsection. See [FAR 1.105-2](#).



**Example:** FAR 45.303-2. We are dealing with FAR Part 45. The Subpart is 45.3. The Section is 45.303 and the subsection is 45.303-2.

4. Correlation Between FAR Parts and Clauses/Provisions. All clauses and provisions are found in FAR Subpart 52.2. As a result, they each begin with “52.2.” The next two digits in each clause or provision corresponds to the FAR Part in which that particular clause or provision is discussed and prescribed. The number following the hyphen is assigned sequentially and relates to the number of clauses and provisions related to that FAR Part. See FAR 52.101(b).

**Example:** FAR 52.245-2 (prescribed by FAR 45.303-2). This was the second clause developed dealing with Government Property (the subject of FAR Part 45).

5. How to Determine if a Clause or Provision Should Be Included in the Contract. Each clause or provision listed in the FAR cross-references a FAR Section that prescribes when it should or may be included into a contract. The “FAR Matrix” summarizes these prescriptions. It is found at: <http://www.arnet.gov/far/current/matrix/Matrix.pdf>
6. Correlation Between FAR and Agency Supplements. Agency FAR Supplements that further implement something that is also addressed in the FAR must be numbered to correspond to the appropriate FAR number. Agency FAR Supplements that supplement the FAR (discuss something not addressed in the FAR) must utilize the numbers 70 and up. See FAR 1.303(a).

**Example:** FAR 45.407 discusses contractor use of government equipment. The portion of the DFARS addressing this same topic is found at DFARS 245.407. The portion of the AFARS further implementing this topic is found at AFARS 5145.407. FAR 6.303-2 addresses what needs to be included in a justification and approval document (for other than full & open competition). It does not prescribe the actual format, however. The Army has developed a standardized format for its justification and approval documents. AFARS 5106.303-2-90 provides the supplemental requirement to use this format which is contained in the supplemental form AFARS 5153.9005.

## **ATTACHMENT 1: SAMPLE CONTRACT REVIEW CHECKLISTS**



## **ATTACHMENT 2: SAMPLE SOLICITATION**



## **CHAPTER 3**

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## **CHAPTER 3**

### **TYPES OF CONTRACTS**

#### **I. INTRODUCTION.**

- A. In determining which type of contract was entered into by the parties, . . . the court is not bound by the name or label given to a contract. Rather, it must look beyond the first page of the contract to determine what were the legal rights for which the parties bargained, and only then characterize the contract. Crown Laundry & Dry Cleaners, Inc. v. United States, 29 Fed. Cl. 506, 515 (1993).
- B. Following this block of instruction, the student should:
  - 1. Know the factors that a contracting officer must consider in selecting a contract type.
  - 2. Understand the fundamental differences between fixed-price and cost-reimbursement contracts.
  - 3. Understand the characteristics of the various indefinite delivery contracts.

#### **II. CONTRACT TYPES - CATEGORIZED BY PRICE.**

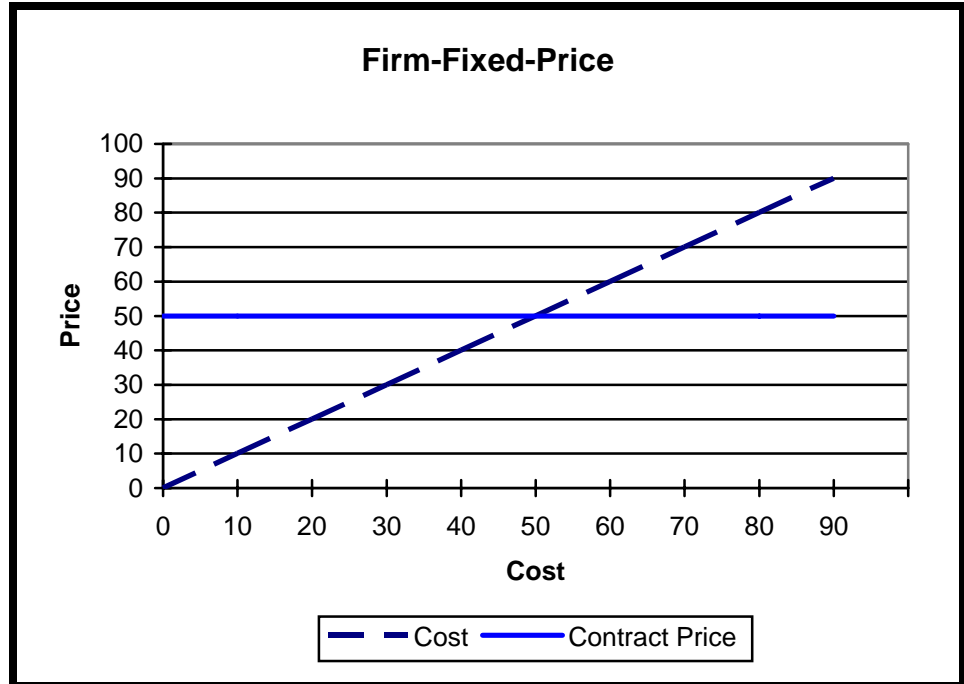
- A. Fixed-Price Contracts. [FAR Subpart 16.2](#).
  - 1. The contractor promises to perform at a fixed-price, and bears the responsibility for increased costs of performance. ITT Arctic Servs., Inc. v. United States, 207 Ct. Cl. 743 (1975); Chevron U.S.A., Inc., ASBCA No. 32323, 90-1 BCA ¶ 22,602 (the risk of increased performance costs in a fixed-price contract is on the contractor absent a clause stating otherwise).

[MAJ Andrew S. Kantner](#)  
54th Graduate Course  
Fall 2005



2. Use of a FP contract is normally inappropriate for research and development work, and has been limited by DOD Appropriations Acts. See FAR 35.006(c) (the use of cost-reimbursement contracts is usually appropriate); But see American Tel. and Tel. Co. v. United States, 48 Fed. Cl. 156 (2000) (upholding completed FP contract for developmental contract despite stated prohibition contained in FY 1987 Appropriations Act).
3. Firm-Fixed-Price Contracts (FFP). FAR 16.202.
  - a. A FFP contract is not subject to any adjustment on the basis of the contractor's cost experience on the contract. It provides maximum incentive for the contractor to control costs and perform effectively, and imposes a minimum administrative burden on the contracting parties. [FAR 16.202-1](#). (See Figure 1, page 3).
  - b. Appropriate for use when acquiring commercial items or for acquiring other supplies or services on the basis of reasonably definite functional or detailed specifications when the contracting officer can establish fair and reasonable prices at the outset, such as when:
    - (1) There is adequate price competition;
    - (2) There are reasonable price comparisons with prior purchases of the same or similar supplies or services made on a competitive basis or supported by valid cost or pricing data;
    - (3) Available cost or pricing information permits realistic estimates of the probable costs of performance; or
    - (4) Performance uncertainties can be identified and reasonable estimates of their cost impact can be made, and the contractor is willing to accept a firm fixed price representing assumption of the risks involved.  
[FAR 16.202-2](#).

**Fixed Price  
= \$50**



**Figure 1**

If in performing the contract, the contractor incurs costs of:	Then the contractor is entitled to the following amount of money:
<b>\$50</b>	
<b>\$40</b>	
<b>\$80</b>	
<b>\$10</b>	

**Discussion Problem:** The NAVAIR Aviation Supply Office (ASO) awarded a firm-fixed-price contract for 9,397 aluminum height adapters to Joe’s Aluminum Manufacturing Corp. Shortly after contract award, the price of aluminum rose drastically. Joe’s refused to continue performance unless the government granted a price increase to cover aluminum costs. The ASO terminated the contract for default and Joe’s appealed the termination to the ASBCA.

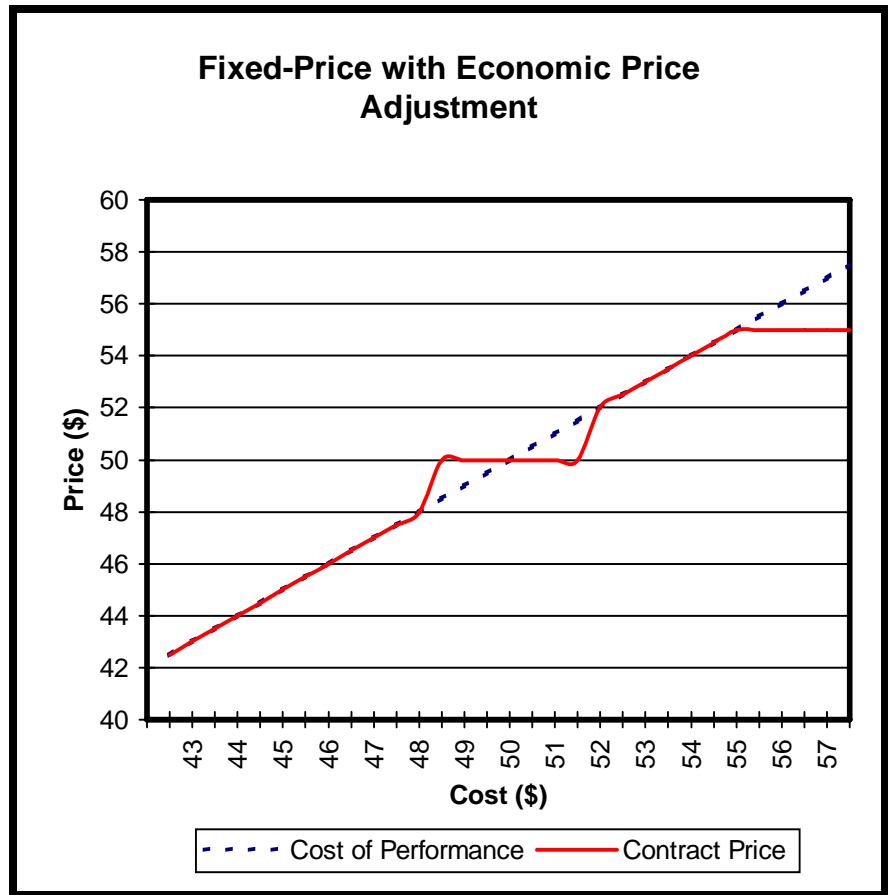
Should the ASO have granted the price increase? Why or why not?

3. Fixed-Price Contracts with Economic Price Adjustment (FP w/ EPA). [FAR 16.203](#); [FAR 52.216-2](#); [FAR 52.216-3](#); and [FAR 52.216-4](#).
  - a. Provides for upward and downward revision of the stated contract price upon the occurrence of specified contingencies. See Transportes Especiales de Automoviles, S.A. (T.E.A.S.A.), ASBCA No. 43851, 93-2 B.C.A. 25,745 (stating that “EPA provisions in government contracts serve an important purpose, protecting both parties from certain specified contingencies.”); MAPCO Alaska Petroleum v. United States, 27 Fed. Cl. 405 (1992) (indicating the potential price revision serves the further salutary purpose of minimizing the need for contingencies in offers and, therefore, reducing offer prices).
  - b. May be used when the contracting officer determines:
    - (1) there is serious doubt concerning the stability of market or labor conditions that will exist during an extended period of contract performance, and
    - (2) contingencies that would otherwise be included in the contract price can be identified and covered separately in the contract. [FAR 16.203-2](#).
  - c. Methods of adjustment for economic price adjustment clauses. [FAR 16.203-1](#).
    - (1) Cost indexes of labor or material (not shown). The standards or indexes are specifically identified in the contract. There is no standard FAR clause prescribed when using this method. The DFARS provides extensive guidelines for use of indexes. See [DFARS 216.203-4\(d\)](#).

- (2) Based on published or otherwise established prices of specific items or the contract end items (not shown). Adjustments should normally be restricted to industry-wide contingencies. See [FAR 52.216-2](#) (standard supplies) and [FAR 52.216-3](#) (semi standard supplies); [DFARS 216.203-4](#) (indicating one should ordinarily only use EPA clauses when contract exceeds simplified acquisition threshold and delivery will not be completed within six months of contract award). The CAFC recently held that market-based EPA clauses are permitted under the FAR. Tesero Hawaii Corp., et. al v. United States, No. 04-5064, 2005 U.S. App. LEXIS 7092 (Apr. 26, 2005).
- (3) Actual costs of labor or material (see Figure 2, page 6). Price adjustments should be limited to contingencies beyond the contractor's control. The contractor is to provide notice to the contracting officer within 60 days of an increase or decrease, or any additional period designated in writing by the contracting officer. Prior to final delivery of all contract line items, there shall be no adjustment for any change in the rates of pay for labor (including fringe benefits) or unit prices for material that would not result in a net change of at least 3% of the then-current contract price. [FAR 52.216-4\(c\)\(3\)](#). The aggregate of the increases in any contract unit price made under the clause shall not exceed 10 percent of the original unit price; there is no limitation on the amount of decreases. [FAR 52.216-4\(c\)\(4\)](#).

**Fixed Price = \$50**

**A price adjustment of plus 3-10% or minus 3-100% will be made depending upon fluctuations in the price of raw materials/labor.**



**Figure 2**

<b>If due to price fluctuations recognized by the EPA clause, the contractor incurs costs of:</b>	<b>Then the contractor is entitled to the following amount of money:</b>
<b>\$50</b>	
<b>\$51</b>	
<b>\$53</b>	
<b>\$55</b>	
<b>\$56</b>	
<b>\$49</b>	
<b>\$47</b>	
<b>\$43</b>	

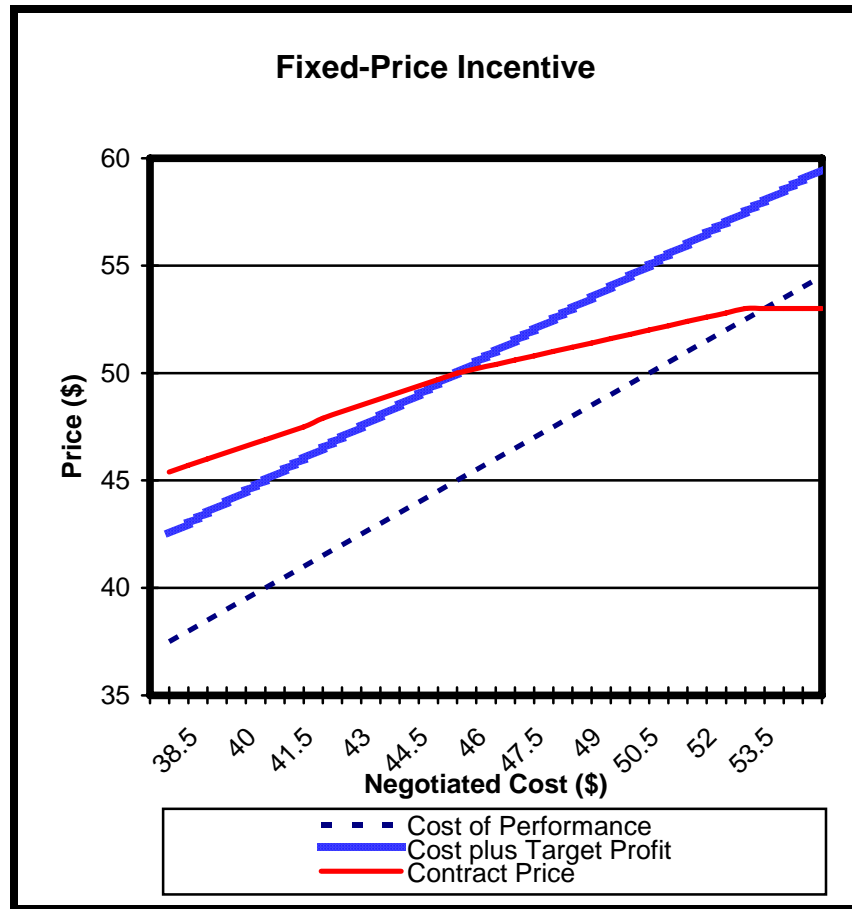
- (4) EPA clauses must be constructed to provide the contractor with the protection envisioned by regulation. Courts and boards may reform EPA clauses to conform to regulations. See Beta Sys., Inc. v. United States, 838 F.2d 1179 (Fed. Cir. 1988) (reformation appropriate where chosen index failed to achieve purpose of EPA clause); Craft Mach. Works, Inc., ASBCA No. 35167, 90-3 BCA ¶ 23,095 (EPA clause did not provide contractor with inflationary adjustment from a base period paralleling the beginning of the contract, as contemplated by regulations). Alternatively, a party may be entitled to fair market value, or *quantum valebant* recovery. Gold Line Ref., Ltd. v. United States, 54 Fed. Cl. 285 (2002) (quantum valebant relief OR reformation of clause to further parties' intent "to adjust prices in accordance with the FAR"); Barrett Ref. Corp. v. United States, 242 F.3d 1055 (Fed. Cir. 2001).
  - d. A contractor may waive its entitlement to an adjustment by not submitting its request within the time specified in the contract. Bataco Indus., 29 Fed. Cl. 318 (1993) (contractor filed requests more than one year after EPA clause deadlines).
3. Fixed-Price Incentive (FPI) Contracts (see Figure 3, page 8). [FAR 16.204](#); [FAR 16.403](#); [FAR 52.216-16](#); and [FAR 52.216-17](#). A FPI contract provides for adjusting profit and establishing the final contract price by application of a formula based on the relationship of final negotiated total cost to the total target cost. The final price is subject to a price ceiling that is negotiated at the outset of the contract.
- a. The contractor must complete a specified amount of work for a fixed-price.
  - b. The government and the contractor agree in advance on a firm target cost, target profit, and profit adjustment formula.

**Target Cost = \$45**  
**Target Profit = \$ 5**  
**Target Price = \$50**

**The contractor's share of any overrun = 60%.**

**The contractor's share of any underrun = 40%.**

**Ceiling Price = \$53**



**Figure 3**

<b>If in performing the contract, the contractor incurs costs of:</b>	<b>Then the contractor is entitled to the following amount of money:</b>
<b>\$45.00</b>	
<b>\$47.50</b>	
<b>\$50.00</b>	
<b>\$52.50</b>	
<b>\$55.00</b>	
<b>\$42.50</b>	
<b>\$40.00</b>	
<b>\$37.50</b>	

- c. Use the FPI contract only when:
  - (1) A FFP contract is not suitable;
  - (2) The supplies or services being acquired and other circumstances of the acquisition are such that the contractor's assumption of a degree of cost responsibility will provide a positive profit incentive for effective cost control and performance; and
  - (3) If the contract also includes incentives on technical performance and/or delivery, the performance requirements provide a reasonable opportunity for the incentives to have a meaningful impact on the contractor's management of the work. [FAR 16.403](#).
- d. Individual line items may have separate incentive provisions. [DFARS 216.403\(b\)\(3\)](#).
- e. The parties may use either FPI (firm target) or FPI (successive targets). [FAR 16.403\(a\)](#).
  - (1) FPI (firm target) specifies a target cost, a target profit, a price ceiling, and a profit adjustment formula. [FAR 16.403-1](#); [FAR 52.216-16](#).
  - (2) FPI (successive targets) specifies an initial target cost, an initial target profit, an initial profit adjustment formula, the production point at which the firm target cost and profit will be negotiated, and a ceiling price. [FAR 16.403-2](#); [FAR 52.216-17](#).

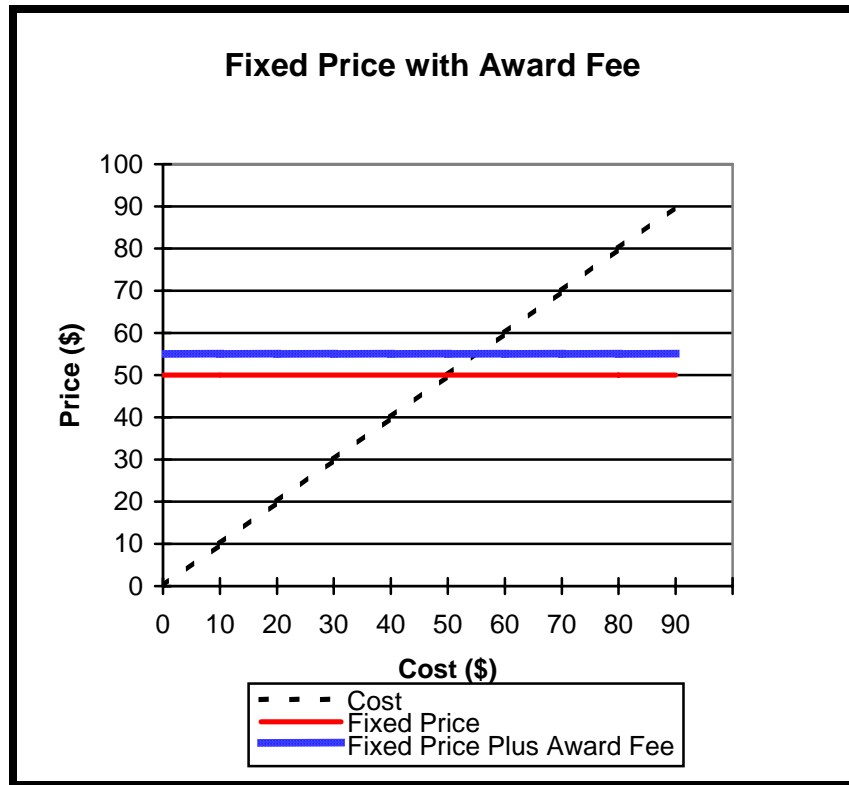


5. Fixed-Price Contracts with Award Fees. [FAR 16.404](#).
- a. The contractor receives a negotiated fixed price (which includes normal profit) for satisfactory contract performance. Award fee (if any) will be paid in addition to that fixed price (see Figure 4, page 11).
  - b. The contract must provide for periodic evaluation of the contractor's performance against an award fee plan. The [Air Force Award Fee Guide](#), which can be found at <http://www.safaq.hq.af.mil/contracting/toolkit/part16/acrobat/award-feeguide.pdf> and the [National Aeronautics And Space Administration Award Fee Contracting Guide](#), available at <http://www.hq.nasa.gov/office/procurement/regs/afguide.html> both contain helpful guidance on setting up award fee evaluation plans.
  - c. This type of contract should be used when the government wants to motivate a contractor and other incentives cannot be used because the contractor's performance cannot be measured objectively.
  - d. Limitation. The following conditions must be present before a fixed price contract with award fee may be used:
    - (1) The administrative costs of conducting award-fee evaluations are not expected to exceed the expected benefits;
    - (2) Procedures have been established for conducting the award-fee evaluation;
    - (3) The award-fee board has been established; and
    - (4) An individual above the level of the contracting officer approved the fixed-price-award-fee incentive.

**Fixed Price = \$50**

**Potential Award Fee = \$5**

**Total Price will be between \$50 and \$55.**



**Figure 4**

If in performing the contract, the contractor incurs costs of:	Then the contractor is entitled to the following amount of money:
\$50	\$50 plus the award fee
\$40	\$50 plus the award fee
\$80	\$50 plus the award fee
If in performing the contract, the contractor performs:	Then the contractor is entitled to the following amount of money:
Exceptionally	\$54-55
Very Good	\$52-54
Fair	\$50-52
Poor	\$50

B. Cost-Reimbursement Contracts. [FAR Subpart 16.3](#).

1. Cost-Reimbursement contracts provide for payment of allowable incurred costs to the extent prescribed in the contract, establish an estimate of total cost for the purpose of obligating funds, and establish a ceiling that the contractor may not exceed (except at its own risk) without the contracting officer's approval. [FAR 16.301-1](#).
2. Application. Use when uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract. [FAR 16.301-2](#).
3. The government pays the contractor's allowable costs plus a fee (often erroneously called profit) as prescribed in the contract.
4. To be allowable, a cost must be reasonable, allocable, properly accounted for, and not specifically disallowed. [FAR 31.201-2](#).
5. The decision to use a cost-type contract is within the contracting officer's discretion. Crimson Enters., B-243193, June 10, 1991, 91-1 CPD ¶ 557 (decision to use cost-type contract reasonable considering uncertainty over requirements causing multiple changes).
6. Limitations on Cost-Type Contracts. [FAR 16.301-3](#).
  - a. The contractor must have an adequate cost accounting system. See CrystaComm, Inc., ASBCA No. 37177, 90-2 BCA ¶ 22,692 (contractor failed to establish required cost accounting system).
  - b. The Government must exercise appropriate surveillance to provide reasonable assurance that efficient methods and effective cost controls are used.
  - c. May not be used for acquisition of commercial items.

7. Cost ceilings are imposed through the Limitation of Cost clause, [FAR 52.232-20](#) (if the contract is fully funded); or the Limitation of Funds clause, [FAR 52.232-22](#) (if the contract is incrementally funded).
- a. When the contractor has reason to believe it is approaching the estimated cost of the contract or the limit of funds allotted, it must give the contracting officer written notice.
  - b. [FAR 32.704](#) provides that a contracting officer must, upon receipt of notice, promptly obtain funding and programming information pertinent to the contract and inform the contractor in writing that:
    - (1) Additional funds have been allotted, or the estimated cost has been increased, in a specified amount; or
    - (2) The contract is not to be further funded and the contractor should submit a proposal for the adjustment of fee, if any, based on the percentage of work completed in relation to the total work called for under the contract; or
    - (3) The contract is to be terminated; or
    - (4) The Government is considering whether to allot additional funds or increase the estimated cost, the contractor is entitled to stop work when the funding or cost limit is reached, and any work beyond the funding or cost limit will be at the contractor's risk.

c. The contractor may not recover costs above the ceiling unless the contracting officer authorizes the contractor to exceed the ceiling. JJM Sys., Inc., ASBCA No. 51152, 03-1 BCA ¶ 32,192; Titan Corp. v. West, 129 F.3d 1479 (Fed. Cir. 1997); Advanced Materials, Inc., 108 F.3d 307 (Fed. Cir. 1997). Exceptions to this rule include:

(1) The overrun was unforeseeable. Johnson Controls World Servs., Inc. v. United States, 48 Fed. Cl. 479 (2001); RMI, Inc. v. United States, 800 F.2d 246 (Fed. Cir. 1986) (burden is on contractor to show overrun was not reasonably foreseeable during time of contract performance); F2 Assoc., Inc., ASBCA No. 52397, 01-2 BCA ¶ 31,530. To establish unforeseeability, the contractor must establish that it maintained an adequate accounting system. SMS Agoura Sys., Inc., ASBCA No. 50451, 97-2 BCA ¶ 29,203 (contractor foreclosed from arguing unforeseeability by prior decision).

(2) Estoppel. Am. Elec. Labs., Inc. v. United States, 774 F.2d 1110 (Fed. Cir. 1985) (partial estoppel where Government induced continued performance through representations of additional availability of funds); Advanced Materials, Inc., 108 F.3d 307 (Fed. Cir. 1997) (unsuccessfully asserted); F2 Assoc., Inc., ASBCA No. 52397, 01-2 BCA ¶ 31,530 (unsuccessfully asserted).

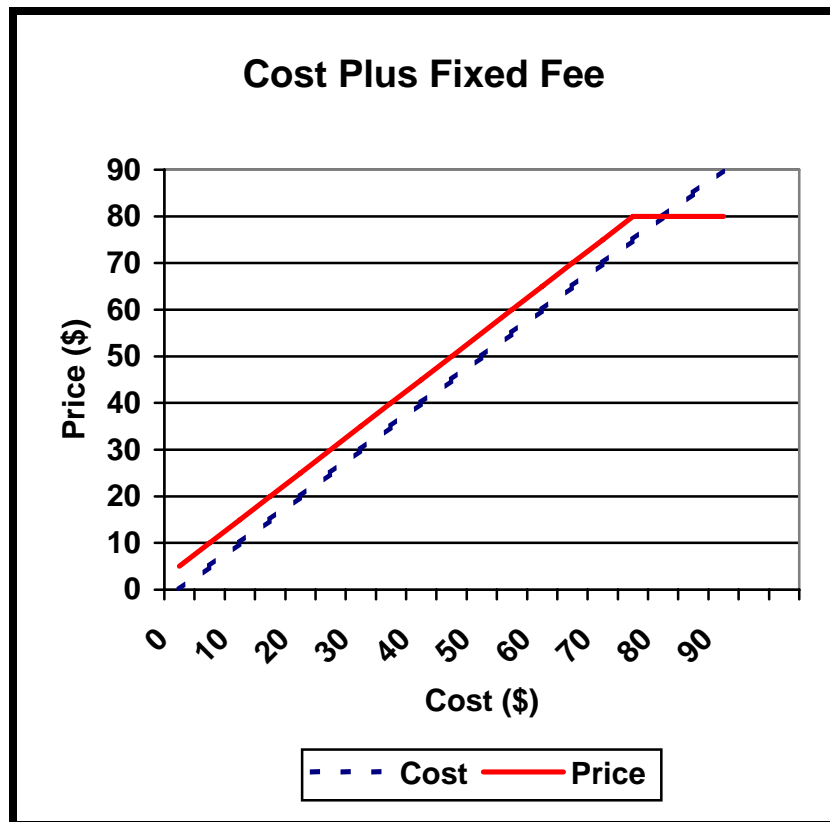
8. Cost-Plus-Fixed-Fee (CPFF) Contracts (see Figure 5, page 15).  
[FAR 16.306](#); [FAR 52.216-8](#).

a. The contract price is the contractor's allowable costs, plus a fixed fee that is negotiated and set prior to award.

**Estimated Cost @  
Time of Award =  
\$50**

**Fixed Fee = \$5**

**Cost Ceiling = \$80**



**Figure 5**

If in performing the contract, the contractor incurs costs of:	Then the contractor is entitled to the following amount of money:
\$50	
\$40	
\$70	
\$80	

- b. Limitation on Maximum Fee for CPFF contracts. [10 U.S.C. § 2306\(d\)](#); [41 U.S.C. § 254\(b\)](#); [FAR 15.404-4\(c\)\(4\)](#).
- (1) Maximum fee limitations are based on the estimated cost at the time of award, not on the actual costs incurred.

- (2) For research and development contracts, the maximum fee is a specific amount no greater than 15% of estimated costs at the time of award.
  - (3) For contracts other than R&D contracts, the maximum fee is a specific amount no greater than 10% of estimated costs at the time of award.
  - (4) In architect-engineer (A-E) contracts, the contract price (cost plus fee) for the A-E services may not exceed 6% of the estimated project cost. Hengel Assocs., P.C., VABCA No. 3921, 94-3 BCA ¶ 27,080.
- c. DOD agencies may not use CPFF contracts on construction contracts estimated to exceed \$25,000 that are funded by a military construction appropriations act, and are to be performed in the United States (except Alaska). [DFARS 216.306](#). Exceptions to this restriction:
- (1) Contracts for environmental restoration at an installation that is being closed or realigned where payments are made from a Base Realignment and Closure (BRAC) Account, or
  - (2) Contracts specifically approved in writing by the Secretaries of the military department for environmental work not classified as construction, or the Secretary of Defense or designee for contracts that are not for environmental work only or are for environmental work classified as construction.

**Discussion Problem:** The US Army Intelligence and Security Command (INSCOM) issued a solicitation for a new computer system for its headquarters building at Fort Belvoir. The solicitation required offerors to assemble a system from commercial-off-the-shelf (COTS) components that would meet the agency's needs. The solicitation provided for the award of a firm-fixed price contract. Several days after issuing the solicitation, INSCOM received a letter from a potential offeror who was unhappy with the proposed contract type. This contractor stated that, although the system would be built from COT components, there was a significant cost risk for the awardee attempting to design a system that would perform as INSCOM required. The contractor suggested that INSCOM award a cost-plus-fixed-fee (CPFF) contract. Additionally, the contractor suggested that INSCOM structure the contract so that the awardee would be paid all of its incurred costs and that the fixed fee be set at 10% of actual costs.

How should INSCOM respond?

9. Cost-Plus-Incentive-Fee (CPIF) Contracts. [FAR 16.304](#); [FAR 16.405-1](#); and [FAR 52.216-10](#).
  - a. The CPIF specifies a target cost, a target fee, minimum and maximum fees, and a fee adjustment formula (see Figure 6, page 18). After contract performance, the fee is determined in accordance with the formula. See *Bechtel Hanford, Inc.*, B-292288, *et. al*, 2003 CPD ¶ 199.
  - b. A CPIF is appropriate for services or development and test programs. [FAR 16.405-1](#). See *Northrop Grumman Corp. v. United States*, 41 Fed. Cl. 645 (1998) (Joint STARS contract).
  - c. The government may combine technical incentives with cost incentives. [FAR 16.405-1\(b\)\(2\)](#).

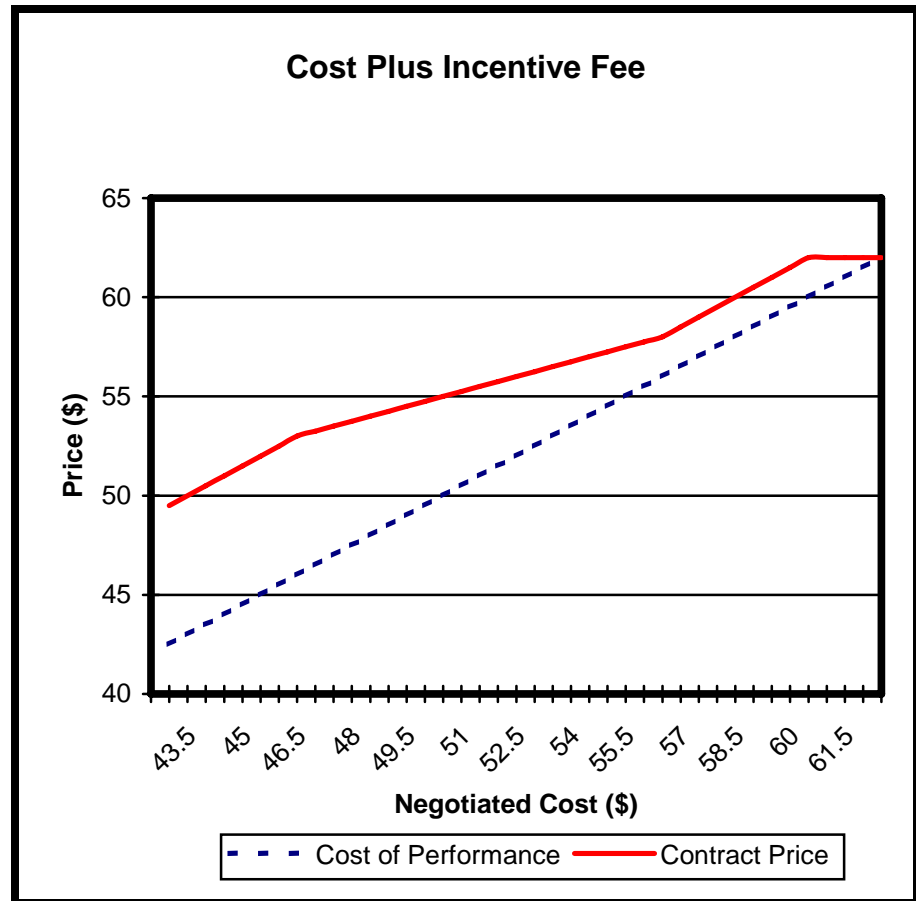


**Target Cost = \$50**  
**Target Fee = \$5**  
**Minimum Fee = \$2**  
**Maximum Fee = \$7**

**The contractor's share of any overrun = 50%.**

**The contractor's share of any underrun = 50%.**

**Cost Ceiling = \$62**



**Figure 6**

If in performing the contract, the contractor incurs costs of:	Then the contractor is entitled to the following amount of money:
\$50.00	
\$55.00	
\$57.50	
\$60.00	
\$62.00	
\$47.50	
\$45.00	

10. Cost-Plus-Award-Fee (CPAF) Contracts. [FAR 16.305](#) and [FAR 16.405-2](#).

- a. The contractor receives its costs plus a fee consisting of a base amount (which may be zero) and an award amount based upon a judgmental evaluation by the Government sufficient to provide motivation for excellent contract performance (see Figure 7 below).
- b. Limitations on base fee. DOD contracts limit base fees to 3% of the estimated cost of the contract exclusive of fee.  
[DFARS 216.405-2\(c\)\(ii\)](#).

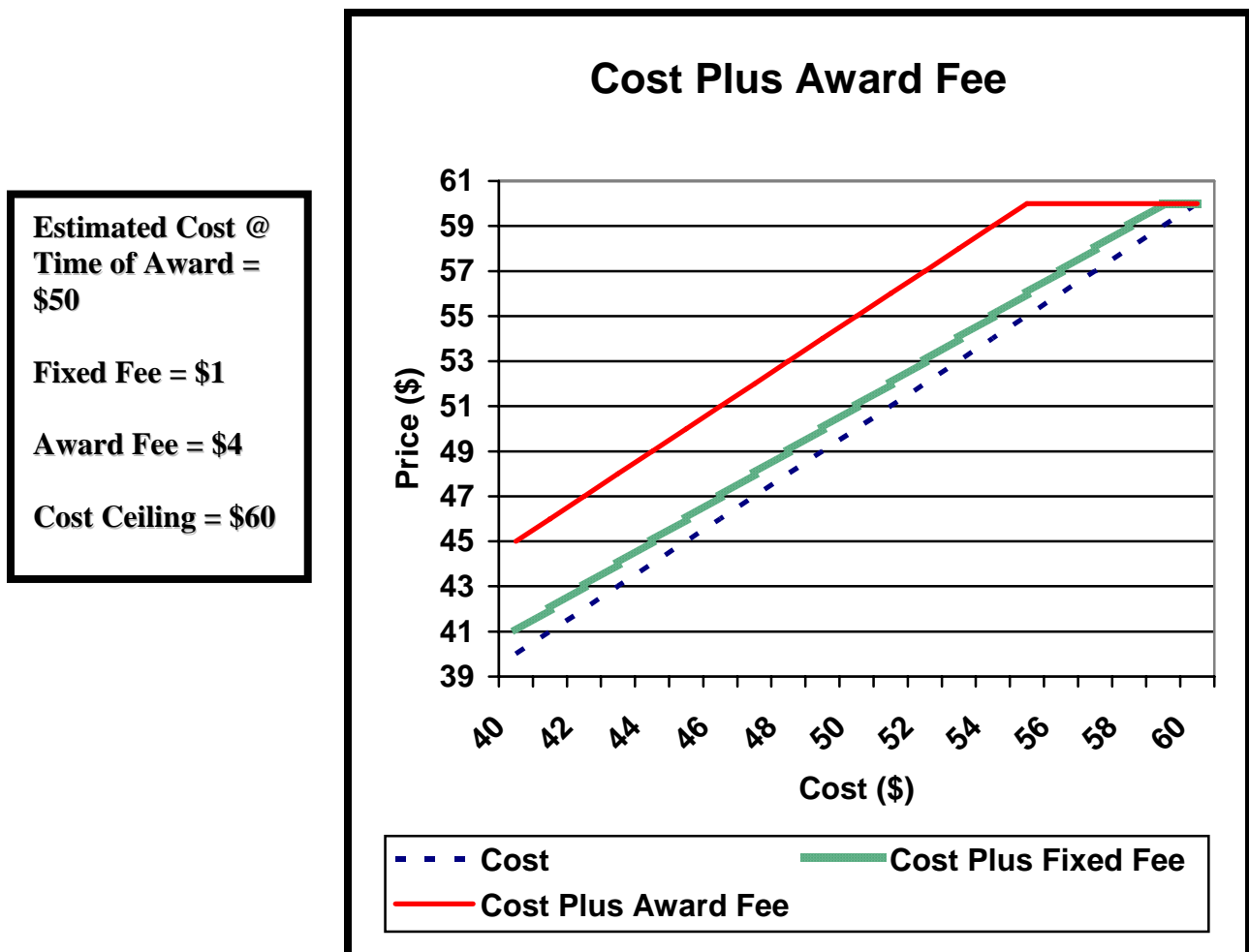


Figure 7

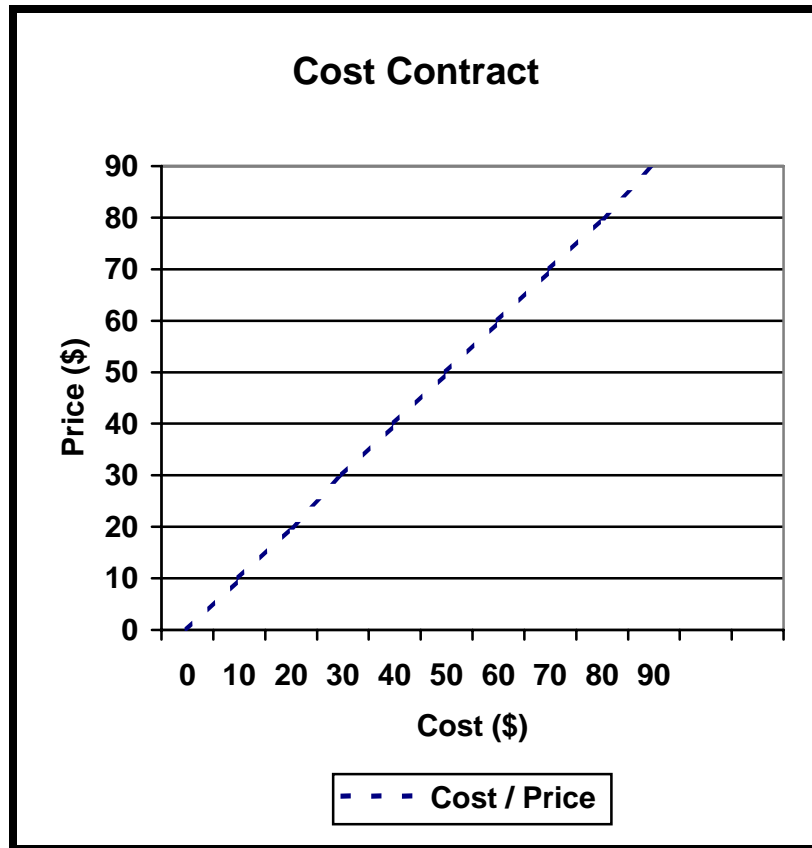
<b>If in performing the contract, the contractor incurs costs of:</b>	<b>Then the contractor is entitled to the following amount of money:</b>
<b>\$50</b>	<b>\$51 (+ up to \$4 of award fee)</b>
<b>\$55</b>	<b>\$56 (+ up to \$4 of award fee)</b>
<b>\$57</b>	<b>\$58 (+ up to \$4 of award fee)</b>
<b>\$60</b>	<b>\$61 (+ up to \$4 of award fee)</b>
<b>\$50 and performs exceptionally</b>	<b>\$55???</b>
<b>\$50 and performs very well</b>	<b>\$54???</b>
<b>\$50 and performs poorly</b>	<b>\$51???</b>

- c. Award fee. The DFARS lists sample performance evaluation criteria in a table that includes time of delivery, quality of work, and effectiveness in controlling and/or reducing costs. See DFARS Part 216, Table 16-1. The Air Force Award Fee Guide and the National Aeronautics And Space Administration Award Fee Contracting Guide both contain helpful guidance on setting up award fee evaluation plans.
- d. The determination and methodology for determining the award fee are unilateral decisions made solely at the discretion of the government. FAR 16.405-2. These decisions are subject to the Disputes Clause, but typically they are only reviewable for abuse of discretion, for example, if a decision was arbitrary and capricious. Burnside-Ott Aviation Training Center v. Dalton, Secretary of the Navy, 107 F.3d 854, 859-60 (Fed. Cir. 1997); see also Overstreet Electric Co. Inc., ASBCA No. 52401, 00-2 BCA ¶ 30,981 (June 15, 2000).
- e. The FAR requires that an appropriate award-fee clause be inserted in solicitations and contracts when an award-fee contract is contemplated, and that the clause '[e]xpressly provide[s] that the award amount and the award-fee determination methodology are unilateral decisions made solely at the discretion of the government.' FAR 16.405-2(e)(3). There is no such boilerplate clause in the FAR and therefore such a clause must be written manually.

- f. A contractor is entitled to unpaid award fee when the government terminates a cost-plus-award fee contract for convenience. Northrop Grumman Corp. v. Goldin, 136 F.3d 1479 (Fed. Cir. 1998).
- g. A CPAF contract shall provide for evaluations at stated intervals during performance so the contractor will periodically be informed of the quality of its performance and the areas in which improvement is expected. Partial payment shall generally correspond to the evaluation periods. [FAR 16.405-2\(b\)\(3\)](#).
- h. The award fee schedule determines when the award fee payments are made. The fee schedule does not need to be proportional to the work completed. Textron Defense Sys. v. Widnall, 143 F.3d 1465 (Fed. Cir. 1998) (end-loading award fee to later periods).

11. Cost Contracts. [FAR 16.302](#); [FAR 52.216-11](#).

- a. The contractor receives its allowable costs but no fee (see Figure 8 below).
- b. May be appropriate for research and development work, particularly with nonprofit educational institutions or other nonprofit organizations, and for facilities contracts.



**Figure 8**

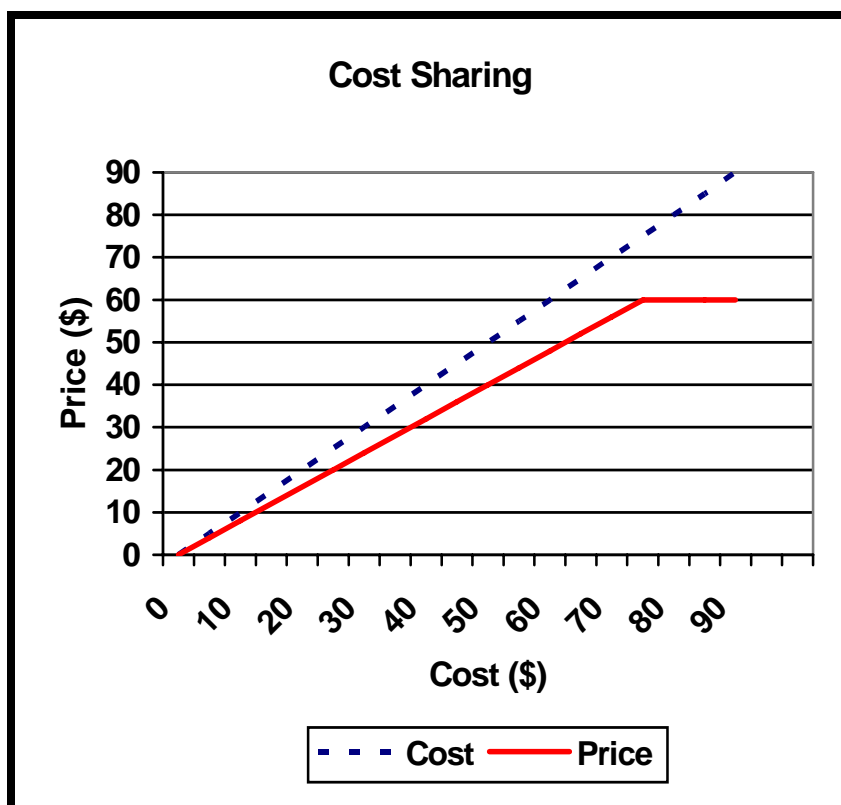
<b>If in performing the contract, the contractor incurs costs of:</b>	<b>Then the contractor is entitled to the following amount of money:</b>
\$50	\$50
\$60	\$60
\$30	\$30
\$100	???

12. Cost-Sharing Contracts. [FAR 16.303](#); [FAR 52.216-12](#).

- a. The contractor is reimbursed only for an agreed-upon portion of its allowable cost (see Figure 9 below).
- b. Normally used where the contractor will receive substantial benefit from the effort.

Contractor is paid  
80% of negotiated  
costs.

Price Ceiling = \$60



If in performing the contract, the contractor incurs costs of:	Then the contractor is entitled to the following amount of money:
\$50	\$40
\$60	\$48
\$70	\$56
\$80	???

C. Time-and-Materials and Labor-Hour Contracts. [FAR Subpart 16.6](#).

1. Application. Use these contracts when it is not possible at contract award to estimate accurately or to anticipate with any reasonable degree of confidence the extent or duration of the work. [FAR 16.601\(b\)](#); [FAR 16.602](#).

2. Government Surveillance. Appropriate surveillance is required to assure that the contractor is using efficient methods to perform these contracts, which provide no positive profit incentive for a contractor to control costs or ensure labor efficiency. [FAR 16.601\(b\)\(1\)](#); [FAR 16.602](#). CACI, Inc. v. General Services Administration, GSBCA No. 15588, 03-1 BCA ¶ 32,106.
3. Limitation on use. The contracting officer must execute a D&F that no other contract type is suitable, and include a contract price ceiling. [FAR 16.601\(c\)](#); [FAR 16.602](#).
4. Types.
  - a. Time-and-materials (T&M) contracts. Provide for acquiring supplies or services on the basis of:
    - (1) Direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit; and
    - (2) Materials at cost, including, if appropriate, material handling costs as part of material costs.
      - (a) Material handling costs shall include those costs that are clearly excluded from the labor-hour rate, and may include all appropriate indirect costs allocated to direct materials.
      - (b) An optional pricing method described at [FAR 16.601\(b\)\(3\)](#) may be used when the contractor is providing material it sells regularly to the general public in the ordinary course of business, and several other requirements are met.
  - b. Labor-hour contracts. Differs from T&M contracts only in that the contractor does not supply the materials. [FAR 16.602](#).

D. Level of Effort Contracts.

1. Firm-fixed-price, level-of-effort term contract. [FAR 16.207](#). Government buys a level of effort for a certain period of time, i.e., a specific number of hours to be performed in a specific period. Suitable for investigation or study in a specific R&D area, typically where the contract price is \$100,000 or less.
  2. Cost-plus-fixed-fee-term form contract. [FAR 16.306\(d\)\(2\)](#). Similar to the firm-fixed-price level-of-effort contract except that the contract price equals the cost incurred plus a fee. The contractor is required to provide a specific level of effort over a specific period of time.
- E. Award Term Contracts. Similar to award fee contracts, a contractor earns the right, upon a determination of exceptional performance, to have the contract's term or duration extended for an additional period of time. There has been no guidance from the FAR on this type of contract. [The Air Force Material Command's "Contracting Policy" Website](#) has guidance on award term contracts.

### **III. CONTRACT TYPES - INDEFINITE DELIVERY CONTRACTS.**

- A. Indefinite Delivery Contracts. [FAR Subpart 16.5](#).
1. [FAR 16.501-2\(a\)](#) recognizes three types of indefinite delivery contracts: definite-quantity contracts, requirements contracts, and indefinite-quantity contracts.
  2. Advantages. All three types permit Government stocks to be maintained at minimum levels, and permit direct shipment to users.
- B. Definite-Quantity/Indefinite-Delivery Contracts. [FAR 16.502](#); [FAR 52.216-20](#). The quantity and price are specified for a fixed period. The government issues delivery orders that specify the delivery date and location.
- C. Indefinite-Quantity Contracts Generally. [FAR 16.504](#).
1. Indefinite or variable quantity contracts permit flexibility in both quantities and delivery schedules.



2. These contracts permit ordering of supplies or services after requirements materialize.
3. An indefinite quantity contract must be either a requirements or an ID/IQ contract. See Satellite Servs., Inc., B-280945, B-280945.2, B-280945.3, Dec. 4, 1998, 98-2 CPD ¶ 125 (solicitation flawed where it neither guaranteed a minimum quantity nor operated as a requirements contract).
4. Definitions. [FAR 16.501-1](#).
  - a. Delivery order contract. A contract for supplies that does not procure or specify a firm quantity of supplies (other than a minimum or maximum quantity) and that provides for the issuance of orders for the delivery of supplies during the period of the contract.
  - b. Task order contract. A contract for services that does not procure or specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract.

D. Requirements Contracts. [FAR 16.503](#); [FAR 52.216-21](#).

1. The government promises to order all of its requirements, if any, from the contractor, and the contractor promises to fill all requirements. See Sea-Land Serv., Inc., B-266238, Feb. 8, 1996, 96-1 CPD ¶ 49 (solicitation for requirements contract which contained a “Limitation of Government Liability” clause purporting to allow the government to order services elsewhere rendered contract illusory for lack of consideration).
  - a. The Government breaches the contract when it purchases its requirements from another source. Datalect Computer Servs. Inc. v. United States, 56 Fed. Cl. 178 (2003) (finding agency breached its requirements contract covering computer maintenance services where agency later obtained extended warranty from equipment manufacturer covering same items); Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982); T&M Distributors, Inc., ASBCA No. 51279, 01-2 BCA ¶ 31,442 (finding that Ft. Carson breached its requirements contract covering the operation of an auto parts store when certain tenant units elected to order their parts from cheaper suppliers).
  - b. The Government also may breach the contract if it performs the contracted-for work in-house. C&S Park Serv., Inc., ENGBCA Nos. 3624, 3625, 78-1 BCA ¶ 13,134 (failure to order mowing services in a timely fashion combined with use of government employees to perform mowing services entitled contractor to equitable adjustment under changes clause). The Government deferral or backlogging of its orders such that it does not order its actual requirements from a contractor is also a breach of a requirements contract. R&W Flammann GmbH, ASBCA Nos. 53204, 53205, 02-2 BCA ¶ 32,044.
  - c. Reported cases measure a contractor’s relief under various theories: common-law breach (lost profits); the contract’s Changes clause (difference between the cost of work originally called for and the work as performed); or the Termination for Convenience clause (settlement costs).

- d. Contractors often seek – but are generally unable to obtain – lost profits as a measure of damages when the Government purchases supplies or services from an outside source. See Rumsfeld, v. Applied Companies, Inc., 318 F.3d 1317 (Fed. Cir. 2002); T&M Distributors, Inc., ASBCA No. 51279, 01-2 BCA ¶ 31,442; Carroll Auto., ASBCA No. 50993, 98-2 BCA ¶ 29,864.
  - e. The Government cannot escape liability for the breach of a requirements contract by retroactively asserting constructive termination for convenience. T&M Distributors, Inc., ASBCA No. 51279, 01-2 BCA ¶ 31,442; Carroll Auto., ASBCA No. 50993, 98-2 BCA ¶ 29,864 (Government invoked constructive T4C theory two years after contract performance).
2. A requirements contract must contain [FAR 52.216-21](#). If the Government inadvertently or intentionally omits this clause, a court or board will examine other intrinsic / extrinsic evidence to determine whether it is a requirements contract. See, e.g., Centurion Elecs. Serv., ASBCA No. 51956, 03-1 BCA ¶ 32,097 (holding that a contract to do all repairs on automated data processing equipment and associated network equipment at Fort Leavenworth was a requirements contract despite omission of requisite clause).
  3. The Contracting Officer shall state a realistic estimated total quantity in the solicitation and resulting contract. The estimate is not a representation to an offeror or contractor that the estimated quantity will be required or ordered, or that conditions affecting requirements will be stable or normal. The estimate may be obtained from records of previous requirements and consumption, or by other means, and should be based on the most current information available. [FAR 16.503\(a\)\(1\)](#).
    - a. There is no need to create or search for additional information. Medart v. Austin, 967 F.2d 579 (Fed. Cir. 1992) (court refused to impose a higher standard than imposed by regulations in finding reasonable the use of prior year's requirements as estimate).

- b. Failure to use available data or calculate the estimates with due care may entitle the contractor to additional compensation. See Hi-Shear Tech. Corp. v. United States, 53 Fed. Cl. 420 (2002) (noting the government “is not free to carelessly guess at its needs” and that it must calculate its estimates based upon “all relevant information that is reasonably available to it.”); S.P.L. Spare Parts Logistics, Inc., ASBCA Nos. 51118, 51384, 02-2 BCA ¶ 31,982; Crown Laundry & Dry Cleaners v. United States, 29 Fed. Cl. 506 (1993) (finding the government was negligent where estimates were exaggerated and not based on historical data) and Contract Mgmt., Inc., ASBCA No. 44885, 95-2 BCA ¶ 27,886 (granting relief under the Changes clause where Government failed to revise estimates between solicitation and award to reflect funding shortfalls); see also Beldon Roofing & Remodeling Co., B-277651, Nov. 7, 1997, CPD 97-2 ¶ 131 (recommending cancellation of IFB where solicitation failed to provide realistic quantity estimates).
4. The only limitation on the Government’s freedom to vary its requirements after contract award is that it be done in good faith.
  - a. The Government acts in good faith if it has a valid business reason for varying its requirements, other than dissatisfaction with the contract. Technical Assistance Int’l, Inc. v. United States, 150 F.3d 1369 (Fed. Cir. 1998) (no breach or constructive change where Government diminished need for vehicle maintenance and repair work by increasing rate at which it added new vehicles into the installation fleet); Shear Tech. Corp. v. United States, 53 Fed. Cl. 420 (2002).
  - b. “Bad faith” includes actions “motivated solely by a reassessment of the balance of the advantages and disadvantages under the contract” such that the buyer decreases its requirements to avoid its obligations under the contract. Technical Assistance Int’l, Inc. v. United States, 150 F.3d 1369, 1372 (Fed. Cir. 1998) (citing Empire Gas Corp. v. Am. Bakeries Co., 840 F. 2d 1333, 1341 (7th Cir. 1988)).
  - c. The Government is not liable for acts of God that cause a reduction in requirements. Sentinel Protective Servs., Inc., ASBCA No. 23560, 81-2 BCA ¶ 15,194 (drought reduced need for grass cutting).

4. Limits on use of requirements Contracts for Advisory and Assistance Services (CAAS).<sup>1</sup> [10 U.S.C. § 2304b\(e\)\(2\)](#); [FAR 16.503\(d\)](#). Activities may not issue solicitations for requirements contracts for advisory and assistance services in excess of three years and \$10 million, including all options, unless the contracting officer determines in writing that the use of the multiple award procedures is impracticable. See para. III.E.9b, infra.
- E. Indefinite-Quantity/Indefinite-Delivery Contracts (also called ID/IQ or Minimum Quantity Contracts). [FAR 16.504](#).
1. An ID/IQ contract shall require the Government to order and the contractor to furnish at least a stated minimum quantity of supplies or services. In addition, if ordered, the contractor shall furnish any additional quantities, not to exceed the stated maximum. [FAR 16.504\(a\)](#).
  2. Application. Contracting officers may use an ID/IQ contract when the Government cannot predetermine, above a specified minimum, the precise quantities of supplies or services that the Government will require during the contract period, and it is inadvisable for the Government to commit itself for more than a minimum quantity. The contracting officer should use an indefinite quantity contract only when a recurring need is anticipated. [FAR 16.504\(b\)](#).

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<sup>1</sup> “Advisory and assistance services” means those services provided under contract by nongovernmental sources to support or improve: organizational policy development; decision making; management and administration; program and/or program management and administration; or R&D activities. It can also mean the furnishing of professional advice or assistance rendered to improve the effectiveness of Federal management processes or procedures (including those of an engineering or technical nature). All advisory and assistance services are classified as: Management and professional support services; Studies, analyses and evaluations; or Engineering and technical services. [FAR 2.101](#). See also [DOD Directive 4205.2, Acquiring And Managing Contracted Advisory And Assistance Services \(CAAS\) \(10 Feb. 92\)](#); as well as [AR 5-14, Management of Contracted Advisory and Assistance Services \(15 Jan. 93\)](#).

3. In order for the contract to be binding, the minimum quantity in the contract must be more than a nominal quantity. FAR 16.504(a)(2). See Wade Howell, d.b.a. Howell Constr. v. United States, 51 Fed. Cl. 516 (2002); Aalco Forwarding, Inc., et. al., B-277241.15, Mar. 11, 1998, 98-1 CPD ¶ 87 (\$25,000 minimum for moving and storage services); Sea-Land Serv. Inc., B-278404.2 Feb. 9, 1998, 98-1 CPD ¶ 47 (after considering the acquisition as a whole, found guarantee of one “FEU”<sup>2</sup> per contract carrier was adequate consideration to bind the parties). If the contract contains option year(s), only the base period of performance must contain a non-nominal minimum to constitute adequate consideration. Varilease Technology Group, Inc. v. United States, 289 F.3d 795 (Fed. Cir. 2002)
4. The contractor is entitled to receive only the guaranteed minimum. Travel Centre v. Barram, 236 F.3d 1316 (Fed. Cir. 2001) (holding that agency met contract minimum so “its less than ideal contracting tactics fail to constitute a breach”); Crown Laundry & Dry Cleaners, Inc., ASBCA No. 39982, 90-3 BCA ¶ 22,993; but see Community Consulting Int’l., ASBCA No. 53489, 02-2 BCA ¶31,940 (holding the Government breached its duty to fairly consider offers on orders under a multiple award contract even though it had given the contractor the minimum it was guaranteed by the contract).
5. The government may not retroactively use the Termination for Convenience clause to avoid damages for its failure to order the minimum quantity. Compare Maxima Corp. v. United States, 847 F.2d 1549 (Fed. Cir. 1988) (termination many months after contract completion where minimum not ordered was invalid), and PHP Healthcare Corp., ASBCA No. 39207, 91-1 BCA ¶ 23,647 (contracting officer may not terminate an indefinite-quantity contract for convenience after end of contract term), with Hermes Consolidated, Inc. d/b/a Wyoming Refining Co., ASBCA Nos. 52308, 52309, 2002 ASBCA LEXIS 11 (partial T4C with eight days left in ordering period proper) and Montana Ref. Co., ASBCA No. 50515, 00-1 BCA ¶ 30,694 (partial T4C proper when Government reduced quantity estimate for jet fuel eight months into a twelve month contract).

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<sup>2</sup> Meaning Forty-Foot Equivalent Unit, an FEU is an industry term for cargo volumes measuring 8 feet high, 8 feet wide, and 40 feet deep.

6. The contractor must prove the damages suffered when the Government fails to order the minimum quantity. The standard rule of damages is to place the contractor in as good a position as it would have been had it performed the contract. White v. Delta Contr. Int'l, Inc., 285 F.3d 1040, 43 (Fed. Cir. 2002) (noting that “the general rule is that damages for breach of contract shall place the wronged party in as good a position as it would have been in, had the breaching party fully performed its obligation”); PHP Healthcare Corp., ASBCA No. 39207, 91-1 BCA ¶ 23,647 (holding the contractor was not entitled to receive the difference between the guaranteed minimum and requiring the parties to determine an appropriate quantum); AJT Assocs., Inc., ASBCA No. 50240, 97-1 BCA ¶ 28,823 (holding the contractor was only entitled to lost profits on unordered minimum quantity).
7. The contract statement of work cannot be so broad as to be inconsistent with statutory authority for task order contracts and the requirements of the Competition in Contracting Act. See Valenzuela Eng'g, Inc., B-277979, Jan. 26, 1998, 98-1 CPD ¶ 51 (statement of work for operation and maintenance services at any government facility in the world deemed impermissibly broad).
8. [FAR 16.506\(a\)\(4\) and 16.506 \(f\) & \(6\)](#) set forth several requirements for indefinite-quantity solicitations and contracts, including the use of [FAR 52.216-27](#), Single or Multiple Awards, and [FAR 52.216-28](#), Multiple Awards for Advisory and Assistance Services.
9. [FAR 16.504\(c\)](#) establishes a preference for making multiple awards of indefinite-quantity contracts under a single solicitation for similar supplies or services. See Nations, Inc., B-272455, Nov. 5, 1996, 96-2 CPD ¶ 170 (GAO ruled that the government must make multiple awards in CAAS indefinite delivery/indefinite quantity type of contracts). The contracting officer must document the decision whether or not to make multiple awards in the acquisition plan or contract file.

- a. A contracting officer must not make multiple awards if one or more of the conditions specified in [FAR 16.504\(c\)\(1\)\(ii\)\(B\)](#) are present.
- (1) Only one contractor is capable of providing performance at the level of quality required because the supplies or services are unique or highly specialized;
  - (2) Based on the contracting officer's knowledge of the market, more favorable terms and conditions, including pricing, will be provided if a single award is made;
  - (3) The cost of administration of multiple contracts may outweigh any potential benefits from making multiple awards;
  - (4) The tasks likely to be ordered are so integrally related that only a single contractor can reasonably perform the work;
  - (5) The total estimated value of the contract is less than the simplified acquisition threshold; or
  - (5) Multiple awards would not be in the best interests of the government.



b. For advisory and assistance services contracts exceeding three years and \$10 million, including all options, the contracting officer must make multiple awards unless ([FAR 16.504\(c\)\(2\)](#)):

- (1) The contracting officer or other official designated by the head of the agency makes a written determination as part of acquisition planning that multiple awards are not practicable because only one contractor can reasonably perform the work because either the scope of work is unique or highly specialized or the tasks so integrally related. Compare Nations, Inc., B-272455, Nov. 5, 1996, 96-2 CPD ¶ 170 (ruling that Army's failure to execute D&F justifying single award rendered RFP defective) with Cubic Applications, Inc., v. United States, 37 Fed. Cl. 345 (1997) (Cubic not entitled to equity where it failed to raise multiple award issue prior to award);
- (2) The contracting officer or other official designated by the head of the agency determines in writing, after the evaluation of offers, that only one offeror is capable of providing the services required at the level of quality required; or
- (3) Only one offer is received; or
- (4) The contracting officer or other official designated by the head of the agency determines that the advisory and assistance services are incidental and not a significant component of the contract.

10. Placing Orders. [FAR 16.505](#).

- a. [FAR 16.505\(a\)](#) sets out the general requirements for orders under delivery or task order contracts. A separate synopsis under [FAR 5.201](#) is not required for orders.

- b. Orders under multiple award contracts. [FAR 16.505\(b\)](#).
- (1) Fair Opportunity. Each awardee must be given a “fair opportunity to be considered for each order in excess of \$2,500.” See Nations, Inc., B-272455, Nov. 5, 1996, 96-2 CPD ¶ 170.
  - (2) Exceptions. Awardees need not be given an opportunity to be considered for an order if: there is an urgent need; there is only one capable source, the order is a logical follow-on to a previously placed order, or the order is necessary to satisfy a minimum guarantee. [FAR 16.505\(b\)\(2\)](#).
  - (3) [DFARS 208.404-70](#) requires that any order off of a Federal Supply Schedule (FSS) in excess of \$100,000 be made on a competitive basis. The Contracting Officer must either: issue the notice to as many schedule holders as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that proposals will be received from at least 3 sources that offer the required work; or contact all schedule holders that offer the required work by informing them of the opportunity for award.
  - (4) [DFARS 216.505-70](#) requires any task order in excess of \$100,000 placed under a non-FSS multiple award contract (MAC) also be made on a competitive basis. All awardees that offer the required work must be provide a copy of the description of work, the basis upon which the contracting officer will make the selection, and given the opportunity to submit a proposal.
  - (3) The contract may specify maximum or minimum quantities that may be ordered under each task or delivery order. [FAR 16.504\(a\)\(3\)](#). However, individual orders need not be of some minimum amount to be binding. See C.W. Over and Sons, Inc., B-274365, Dec. 6, 1996, 96-2 CPD ¶ 223 (individual delivery orders need not exceed some minimum amount to be binding).

- (4) Any sole source order under the FSS or MAC requires approval consistent with the approval levels in FAR 6.304. *See* Memorandum, Director, Defense Procurement and Acquisition Policy, to Senior Procurement Executives & Directors of Defense Agencies, subject: Approval Levels for Sole Source Orders Under FSS and MACs (13 Sep. 04). *See also*, Chapter 5, Contract Attorneys Course Deskbook.
- (5) Protests concerning orders.
  - (a) The issuance of a task or delivery order is generally not protestable.<sup>3</sup> Exceptions include:
    - (1) Where an agency conducts a downselection (selection of one of multiple contractors for continued performance). *See* Electro-Voice, Inc., B-278319, B-278319.2, Jan. 15, 1998, 98-1 CPD ¶ 23.
    - (2) Where an agency conducts a competition among ID/IQ contractors and arrives at its source selection using negotiated procurement procedures. CourtSmart Digital Sys., Inc., B-292995.2, B-292995.3, Feb. 13, 2004; COMARK Fed. Sys., B-278343, B-178343.2, Jan. 20, 1998.
    - (3) A competition is held between an ID/IQ contractor (or BPA holder) and another vendor. AudioCARE Sys., B-283985, Jan. 31, 2000, 2000 CPD ¶ 24.

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<sup>3</sup> "[A] protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued." [10 U.S.C. § 2304c\(d\)](#). *See also* [4 C.F.R. § 21.5\(a\)](#) (providing that the administration of an existing contract is within the purview of the contracting agency, and is an invalid basis for a GAO protest).

- (4) The order exceeds the contract's scope of work. See Anteon Corp., B-293523, B-293523.2, Mar. 29, 2004, 2004 CPD ¶ 51; Symplicity Corp., B-291902, Apr. 29, 2003 (purchase order improper when it included items not part of the vendor's Federal Supply Schedule contract); Makro Janitorial Servs., Inc., B-282690, Aug. 18, 1999, 99-2 CPD ¶ 39 (task order for housekeeping services beyond scope of preventive maintenance contract).
  - (5) The protest challenges the transfer to an ID/IQ contract the acquisition of services that had been previously set aside for small businesses. LBM, Inc., B-290682, Sep. 18, 2002, 2002 CPD ¶ 157.
- (b) The FAR requires the head of an agency to designate a Task and Delivery Order Ombudsman to review complaints from contractors and ensure they are afforded a fair opportunity to be considered for orders. The ombudsman must be a senior agency official independent of the contracting officer and may be the agency's competition advocate. [FAR 16.505\(b\)\(5\)](#).

**Discussion Problem:** Redstone Arsenal awarded a contract to Hanley's Dirty Laundry, Inc. for laundry services at the installation. The contract contained the standard indefinite quantity clause, however, it did not set forth a guaranteed minimum quantity. At the end of the first year of performance, the government had ordered only half of the contract's estimated quantity. Hanley's filed a claim for the increased unit costs attributable to performing less work than it had anticipated. The Arsenal prepared the estimated quantities for the contract by obtaining estimated monthly usage rates from serviced activities and multiplying by twelve. These estimates were two years old at the time the Arsenal awarded the contract but no attempt was made to update them. In addition, the Arsenal had more recent historical data available but failed to use it. Hanley's argued that the government was liable due to a defective estimate. The government argued that the contract was an indefinite quantity contract, therefore, there was no liability for a defective estimate.

Is the government liable?

#### IV. LETTER CONTRACTS. [FAR 16.603](#).

- A. Use. Letter contracts are used when the Government's interests demand that the contractor be given a binding commitment so that work can start immediately, and negotiating a definitive contract is not possible in sufficient time to meet the requirement.
- B. Approval for Use. The head of the contracting activity (HCA) or designee must determine in writing that no other contract is suitable. [FAR 16.603-3](#); [DFARS 217.7404-1](#). Approved letter contracts must include a not-to-exceed (NTE) price.

- C. Definitization. The parties must definitize the contract (agree upon contractual terms, specifications, and price) by the earlier of the end of the 180 day period after the date of the letter contract, or the date on which the amount of funds obligated under the contractual action is equal to more than 50 percent of the negotiated overall ceiling price for the contractual action.<sup>4</sup> [10 U.S.C. § 2326](#); [DFARS 217.7404-3](#). The maximum liability of the Government shall be the estimated amount necessary to cover the contractor's requirements for funds before definitization, but shall not exceed 50 percent of the estimated cost of the definitive contract unless approved in advance by the official who authorized the letter contract. [10 U.S.C. § 2326\(b\)\(2\)](#); [FAR 16.603-2\(d\)](#); [DFARS 217.7404-4](#).
- D. Restrictions: Letter contracts shall not
1. Commit the Government to a definitive contract in excess of funds available at the time of contract.
  2. Be entered into without competition when required.
  3. Be amended to satisfy a new requirement unless that requirement is inseparable from the existing letter contract.

[FAR 16-603-3](#).

- E. Liability for failure to definitize? See [Sys. Mgmt. Am. Corp.](#), ASBCA Nos. 45704, 49607, 52644, 00-2 BCA ¶ 31,112 (finding Assistant Secretary of the Navy unreasonably refused to approve a proposed definitization of option prices for a small disadvantaged business's supply contract).

## V. **OPTIONS.** [FAR SUBPART 17.2](#).

- A. Definition. A unilateral right in a contract by which, for a specified time, the Government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract.

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<sup>4</sup> [FAR 16.603-2\(c\)](#) provides for definitization within 180 days after date of the letter contract or before completion of 40 percent of the work to be performed, whichever occurs first.

B. Use of Options. [FAR 17.202](#).

1. The Government can use options in contracts awarded under sealed bidding and negotiated procedures when in the Government's interest.
2. Inclusion of an option is normally not in the Government's interest when:
  - a. The foreseeable requirements involve:
    - (1) Minimum economic quantities; and
    - (2) Delivery requirements far enough into the future to permit competitive acquisition, production, and delivery.
  - b. An indefinite quantity or requirements contract would be more appropriate than a contract with options. However, this does not preclude the use of an ID/IQ or requirements contract with options.
3. The contracting officer shall not employ options if:
  - a. The contractor will incur undue risks; e.g., the price or availability of necessary materials or labor is not reasonably foreseeable;
  - b. Market prices for the supplies or services involved are likely to change substantially; or
  - c. The option represents known firm requirements for which funds are available unless—
    - (1) The basic quantity is a learning or testing quantity; and
    - (2) Competition for the option is impracticable once the initial contract is awarded.
4. Evaluation of options. Normally offers for option quantities or periods are evaluated when awarding the basic contract. [FAR 17.206\(a\)](#).

C. Contract Information.

1. The contract shall state the period within which the option may be exercised. The period may extend beyond the contract completion date for service contracts.
2. The contract shall specify limits on the purchase of additional supplies or services, or the overall duration of the term of the contract.

D. Total Contract Period.

1. Generally, a contract, including all options, may not exceed five years. See FAR 17.204(e). See also 10 U.S.C. 2306b and FAR Subpart 17.1 (limiting multi-year contracts); 10 U.S.C. 2306c and FAR 17.204(e) (limiting certain service Ks); 41 U.S.C. 353(d) and FAR 22.1002-1 (limiting contracts falling under the SCA to 5 years in length); see also Delco Elec. Corp., B-244559, Oct. 29, 1991, 91-2 CPD ¶ 391 (use of options with delivery dates seven and half years later does not violate FAR 17.204(e), because the five year limit applies to five years' requirements in a supply contract); Freightliner, ASBCA No. 42982, 94-1 BCA ¶ 26,538 (option valid if exercised within five years of award).
2. Variable option periods do not restrict competition. Madison Servs., Inc., B-278962, Apr. 17, 1998, 98-1 CPD ¶ 113 (Navy's option clause that allowed the Navy to vary the length of the option period from one to twelve months did not unduly restrict competition).

E. Exercising Options.

1. The government must comply with applicable statutes and regulations before exercising an option. Golden West Ref. Co., EBCA No. C-9208134, 94-3 BCA ¶ 27,184 (option exercise invalid because statute required award to bidder under a new procurement); New England Tank Indus. of N.H., Inc., ASBCA No. 26474, 90-2 BCA ¶ 22,892 (option exercise invalid because of agency's failure to follow DOD regulation by improperly obligating stock funds); see FAR 17.207.
  - a. The Contracting Officer may exercise an option only after determining that:



- (1) Funds are available;<sup>5</sup>
  - (2) The requirement fills an existing need;
  - (3) The exercise of the option is the most advantageous method of fulfilling the Government's need, price and other factors considered;<sup>6</sup> and
  - (4) The option was synopsized in accordance with Part 5 unless exempted under that Part.
- b. The Contracting Officer shall make the determination to exercise the option on the basis of one of the following:
- (1) A new solicitation fails to produce a better price or more advantageous offer.
  - (2) An informal analysis of the market indicates the option is more advantageous.
  - (3) The time between contract award and exercise of the option is so short that the option is most advantageous.

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<sup>5</sup> Failure to determine that funds are available does not render an option exercise ineffective, because it relates to an internal matter and does not create rights for contractors. See United Food Servs., Inc., ASBCA No. 43711, 93-1 BCA ¶ 25,462 (holding valid the exercise of a one-year option subject to availability of funds).

<sup>6</sup> The determination of other factors should take into account the Government's need for continuity of operations and potential costs of disrupting operations. [FAR 17.207\(e\)](#).

2. The government must exercise the option according to its terms. See 4737 Connor Co., L.L.C. v. United States, 2003 U.S. App. LEXIS 3289 (Fed. Cir. 2003) (option exercise was invalid where the Government added a termination provision not present in the base period of the contract at the time of exercise of the option); Lockheed Martin Corp. v. Walker, 149 F.3d 1377 (Fed. Cir. 1998) (Government wrongfully exercised options out of sequence); VARO, Inc., ASBCA No. 47945, 47946, 96-1 BCA ¶ 28,161 (inclusion of eight additional contract clauses in option exercise invalidated the option); The Boeing Co., ASBCA No. 37579, 90-3 BCA ¶ 23,202 (Navy failed to exercise the option within the 60 days allowed in the contract and the board invalidated the option); The Cessna Aircraft Co. v. Dalton, 126 F.3d 1442 (Fed. Cir. 1997) (exercise of option on 1 Oct. proper).
  
3. If a contractor contends that an option was exercised improperly, and performs, it may be entitled to an equitable adjustment. See Lockheed Martin IR Imaging Sys., Inc. v. West, 108 F.3d 319 (1997) (partial exercise of an option was held to be a constructive change to the contract).
  
4. The government has the discretion to decide whether to exercise an option.
  - a. Decision to not exercise.
    - (1) The decision not to exercise an option is generally not a protestable issue since it involves a matter of contract administration. See Young-Robinson Assoc., Inc., B-242229, Mar. 22, 1991, 91-1 CPD ¶ 319 (contractor cannot protest agency's failure to exercise an option because it is a matter of contract administration); but see Mine Safety Appliances Co., B-238597.2, July 5, 1990, 69 Comp. Gen. 562, 90-2 CPD ¶ 11 (GAO reviewed option exercise which was, in effect, a source selection between parallel development contracts).
  
    - (2) A contractor may file a claim under the Disputes clause, but must establish that the Government abused its discretion or acted in bad faith. See Kirk/Marsland Adver., Inc., ASBCA No. 51075, 99-2 ¶ 30,439 (summary judgment to Government); Pennyrile Plumbing, Inc., ASBCA Nos. 44555, 47086, 96-1 BCA ¶ 28,044 (no bad faith or abuse of discretion).

- b. The decision to exercise an option is subject to protest. See Alice Roofing & Sheet Metal Works, Inc., B-283153, Oct. 13, 1999, 99-2 CPD ¶ 70 (protest denied where agency reasonably determined that option exercise was most advantageous means of satisfying needs).

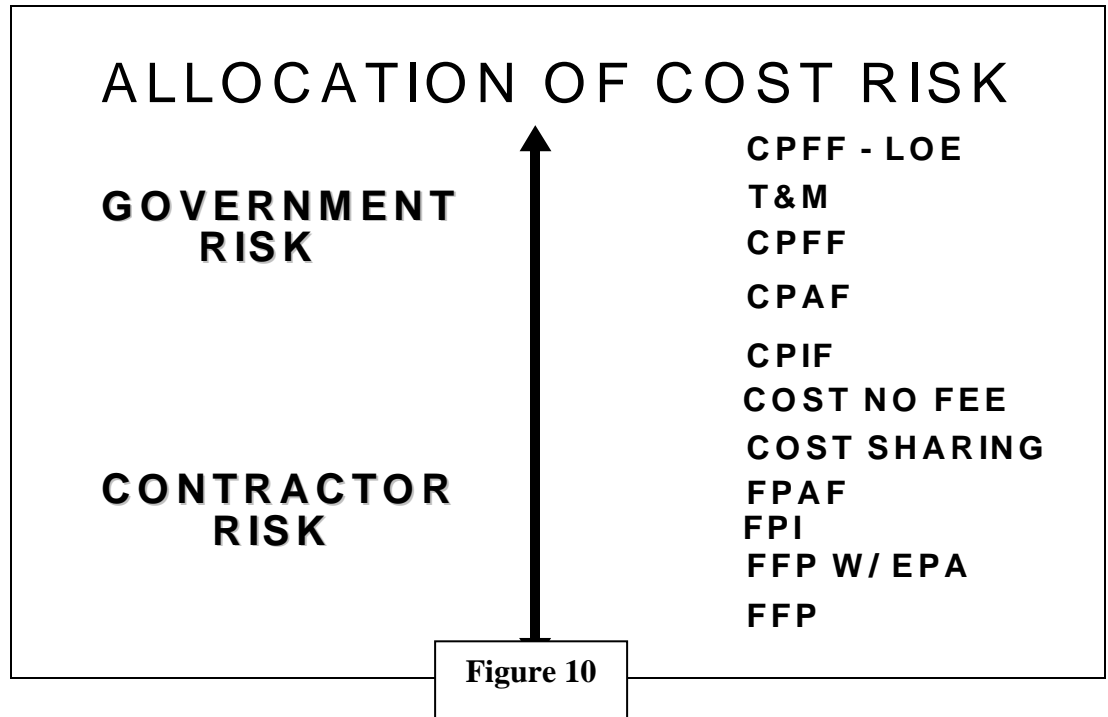
## **VI. SELECTION OF CONTRACT TYPE.**

### **A. Regulatory Limitations.**

1. Sealed Bid Procedures. Only firm-fixed-price contracts or fixed-price contracts with economic price adjustment may be used under sealed bid procedures. [FAR 16.102\(a\)](#) and [FAR 14.104](#).
2. Contracting by Negotiation. Any contract type or combination of types described in the FAR may be selected for contracts negotiated under FAR Part 15. [FAR 16.102\(b\)](#).
3. Commercial items. Agencies must use firm-fixed-price contracts or fixed-price contracts with economic price adjustment to acquire commercial items. As long as the contract utilized is either a firm-fixed-price contract or fixed-price contract with economic price adjustment, however, it may also contain terms permitting indefinite delivery. [FAR 12.207](#). Agencies may also utilize award fee or performance or delivery incentives when the award fee or incentive is based solely on factors other than cost. [FAR 12.207](#); [FAR 16.202-1](#); [FAR 16.203-1](#).

### **B. Factors to Consider.**

Selecting the contract type is generally a matter for negotiation and requires the exercise of sound judgment. The objective is to negotiate a contract type and price (or estimated cost and fee) that will result in reasonable contractor risk and provide the contractor with the greatest incentive for efficient and economical performance. [FAR 16.103\(a\)](#). (See Figure 10, below).



3. Selection of a contract type is ultimately left to the reasonable discretion of the contracting officer. Diversified Tech. & Servs. of Virginia, Inc., B-282497, July 19, 1999, 99-2 CPD ¶ 16 (change from cost-reimbursement to fixed-price found reasonable).

4. There are numerous factors that the contracting officer should consider in selecting the contract type. [FAR 16.104](#).
  - a. Availability of price competition.
  - b. The accuracy of price or cost analysis.
  - c. The type and complexity of the requirement.
  - d. Urgency of the requirement.
  - e. Period of performance or length of production run.
  - f. Contractor's technical capability and financial responsibility.
  - g. Adequacy of the contractor's accounting system.
  - h. Concurrent contracts.
  - i. Extent and nature of proposed subcontracting.
  - j. Acquisition history.
5. In the course of an acquisition, changing circumstances may make a different type appropriate. Contracting Officers should avoid protracted use of cost-reimbursement or time-and-materials contracts after experience provides a basis for firmer pricing. [FAR 16.103\(c\)](#).

C. Statutory Prohibition Against Cost-Plus-Percentage-of-Cost (CPPC) Contracts.

1. The cost-plus-percentage-of-cost system of contracting is prohibited. [10 U.S.C. § 2306\(a\)](#); [41 U.S.C. § 254\(b\)](#); [FAR 16.102\(c\)](#).

2. Identifying cost-plus-percentage-of-cost. In general, any contractual provision is prohibited that assures the Contractor of greater profits if it incurs greater costs. The criteria used to identify a proscribed CPPC system, as enumerated by the court in Urban Data Sys., Inc. v. United States, 699 F.2d 1147 (Fed. Cir. 1983) (adopting criteria developed by the Comptroller General at 55 Comp. Gen. 554, 562 (1975)), are:
  - a. Payment is on a predetermined percentage rate;
  - b. The percentage rate is applied to actual performance costs;
  - c. The Contractor's entitlement is uncertain at the time of award; and
  - d. The Contractor's entitlement increases commensurately with increased performance costs. See also Alisa Corp., AGBCA No. 84-193-1, 94-2 BCA ¶ 26,952 (finding contractor was entitled to *quantum valebant* basis of recovery where contract was determined to be an illegal CPPC contract).
3. Compare The Dep't of Labor-Request for Advance Decision, B-211213, Apr. 21, 1983, 62 Comp. Gen. 337, 83-1 CPD ¶ 429 (finding the contract was a prohibited CPPC) with Tero Tek Int'l, Inc., B-228548, Feb. 10, 1988, 88-1 CPD ¶ 132 (determining the travel entitlement was not uncertain so therefore CPPC was not present).
4. Contract modifications. If the government directs the contractor to perform additional work not covered within the scope of the original contract, the contractor is entitled to additional fee. This scenario does not fall within the statutory prohibition on CPPC contracts. Digicon Corp., GSBCA No. 14257-COM, 98-2 BCA ¶ 29,988.

## VII. CONCLUSION.



## **CHAPTER 4**

### **AUTHORITY TO CONTRACT**

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## **CHAPTER 4**

### **AUTHORITY TO CONTRACT**

- I. INTRODUCTION.** "The United States employs over 3 million civilian employees. Clearly, federal expenditures would be wholly uncontrollable if Government employees could, of their own volition, enter into contracts obligating the United States." *El Centro v. United States*, 922 F.2d 816 (Fed. Cir. 1990).
  
- II. OBJECTIVES.** Following this block of instruction, students should:
  - A. Understand the elements of a contract and the different ways that a contract can be formed.
  
  - B. Understand the constitutional, statutory, and regulatory bases that permit federal executive agencies to contract using appropriated funds (APFs).
  
  - C. Understand how individuals acquire the power to contract on behalf of the government.
  
  - D. Understand the different theories that bind the government in contract.
  
  - E. Understand what constitutes an "unauthorized commitment" and be able to describe how, and by whom, unauthorized commitments may be ratified.

### III. METHODS OF CONTRACT FORMATION.

A. FAR Definition of a Contract. A contract is a mutually binding legal relationship obligating the seller to furnish supplies and services (including construction) and the buyer to pay for them. It includes all types of commitments obligating the government to expend appropriated funds and, except as otherwise authorized, must be in writing. Contracts include bilateral agreements; job orders or task letters issued under a Basic Ordering Agreement; letter contracts; and orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance. FEDERAL ACQUISITION REG. 2.101 (January 2005) [hereinafter FAR].

B. Express Contract.

1. An express contract is a contract whose terms the parties have explicitly set out. BLACK'S LAW DICTIONARY 321 (7th ed. 1999).
2. The required elements to form a government contract are:
  - a. Mutual intent to contract;
  - b. Offer and acceptance; and
  - c. Conduct by an officer having the actual authority to bind the government in contract.

*H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1575 (Fed. Cir. 1984); *OA O Corp. v. United States*, 17 Cl. Ct. 91 (1989).

3. Requirement for contract to be in writing. *See* FAR 2.101 definition of contract, *supra*.

- a. Oral contracts are generally not enforceable against the government unless supported by documentary evidence. *See* 31 U.S.C. § 1501(a)(1) (an amount shall be recorded as an obligation of the United States Government only when supported by documentary evidence of a binding agreement between an agency and another person that is in writing, in a way and form, and for a purpose authorized by law).
- b. The predecessor provision to 31 U.S.C. § 1501(a)(1) was construed as requiring a written contract to obtain court enforcement of an agreement. *United States v. American Renaissance Lines, Inc.*, 494 F.2d 1059 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1020 (1974) (government unable to obtain damages for an unperformed oral contract for carriage).
- c. The Court of Claims held that failure to reduce a contract to writing under 31 U.S.C. 1501(a)(1) should not preclude recovery. Rather, a party can prevail if it introduces additional facts from which a court can infer a meeting of the minds. *Narva Harris Constr. Corp. v. United States*, 574 F.2d 508 (1978).
- d. The Ninth Circuit has held that FAR 2.101 does not prevent a court from finding an implied-in-fact contract. *PacOrd, Inc. v. United States*, 139 F.3d 1320 (9th Cir. 1998).
- e. The Armed Services Board of Contract Appeals has followed the *Narva Harris* position. Various correspondence between parties can be sufficient "additional facts" and "totality of circumstances" to avoid the statutory prohibition in 31 U.S.C. § 1501(a)(1) against purely oral contracts. *Essex Electro Engineers, Inc.*, ASBCA Nos. 30118, 30119, 88-1 BCA ¶ 20,440; *Vec-Tor, Inc.*, ASBCA Nos. 25807 and 26128, 84-1 BCA ¶ 17,145.

- f. The ASBCA has found a binding oral contract existed where the Army placed an order against a GSA requirements contract. *C-MOR Co.*, ASBCA Nos. 30479, 31789, 87-2 BCA ¶ 19,682 (however, the Army placed a written delivery order following a telephone conversation between the contract specialist and C-MOR). *Cf. RMTC Sys.*, AGBCA No. 88-198-1, 91-2 BCA ¶ 23,873 (shipment in response to phone order by employee without contract authority did not create a contract).

C. Implied Contracts.

1. Implied-in-Fact Contract.

- a. Where there is no written contract, contractors often attempt to recover by alleging the existence of a contract "implied-in-fact."
- b. An implied-in-fact contract is "founded upon a meeting of the minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Baltimore & Ohio R.R. Co. v. United States*, 261 U.S. 592, 597 (1923).
- c. The requirements for an implied-in-fact contract are the same as for an express contract; only the nature of the evidence differs. *OAQ Corp. v. United States*, 17 Cl. Ct. 91 (1989) (finding implied-in-fact contract for start-up costs for AF early warning system). *See generally* Willard L. Boyd III, *Implied-in-Fact Contract: Contractual Recovery against the Government without an Express Agreement*, 21 Pub. Cont. L. J. 84-128 (Fall 1991).

2. Implied-in-Law Contract.

- a. An implied-in-law contract is not a true agreement to contract. It is a "fiction of law" where "a promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress." *Baltimore & Ohio R.R. Co. v. United States*, 261 U.S. 592, 597 (1923).

- b. When a contractor seeks recovery under an implied-in-law theory, the government should file a motion to dismiss for lack of jurisdiction. Neither the Contract Disputes Act (CDA) nor the Tucker Act grants jurisdiction to courts and boards to hear cases involving implied-in-law contracts. 41 U.S.C. §§ 601-613; 28 U.S.C. §§ 1346 and 1491. *See Hercules Inc. v. United States*, 516 U.S. 417 (1996); *Amplitronics, Inc.*, ASBCA No. 44119, 94-1 BCA ¶ 26,520.

#### IV. AUTHORITY OF AGENCIES.

- A. Constitutional. As a sovereign entity, the United States has inherent authority to contract to discharge governmental duties. *United States v. Tingey*, 30 U.S. 115 (1831). This authority to contract, however, is limited. Specifically, a government contract must:
  - 1. Not be prohibited by law; and
  - 2. Be an appropriate exercise of governmental powers and duties.
- B. Statutory. Congress has enacted various statutes regulating the acquisition of goods and services by the government. These include the:
  - 1. Armed Services Procurement Act of 1947 (ASPA), 10 U.S.C. §§ 2301 - 2316. The ASPA applies to the procurement of all property (except land) and services purchased with appropriated funds by the Department of Defense (DOD), Coast Guard, and National Aeronautics and Space Administration (NASA).
  - 2. Federal Property and Administrative Services Act of 1949 (FPASA), 41 U.S.C. §§ 251-260. The FPASA governs the acquisition of all property and services by all executive agencies *except* DOD, Coast Guard, NASA, and any agency specifically exempted by 40 U.S.C. § 474 or any other law.

3. Office of Federal Procurement Policy Act (OFPPA), 41 U.S.C. § 401 *et. seq.* This legislation applies to all executive branch agencies, and created the Office of Federal Procurement Policy (OFPP) within the Office of Management and Budget. The Administrator of the OFPP is given responsibility to “provide overall direction of procurement policy and leadership in the development of procurement systems of the executive agencies.” 41 U.S.C. § 405(a).
4. Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304; 41 U.S.C. § 403.
  - a. CICA amended the ASPA and the FPASA to make them identical. Because of subsequent legislative action, they are now different in some significant respects.
  - b. CICA mandates full and open competition for many, but not all, purchases of goods and services.
5. The Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, 108 Stat. 3243. FASA amended various sections of the statutes described above, and eliminated some of the differences between the ASPA and the FPASA.
6. Clinger-Cohen Act, Pub. L. No. 104-106, Division E, § 5101, 110 Stat. 680 (1996) [previously known as the Information Technology Management Reform Act (ITMRA)]. This statute governs the acquisition of information technology by federal agencies. It repealed the Brooks Automatic Data Processing Act, 40 U.S.C. § 759.
7. Annual DOD Authorization and Appropriation Acts.

C. Regulatory.

1. Federal Acquisition Regulation (FAR), codified at 48 C.F.R., chapter 1.
  - a. The FAR is the principal regulation governing federal executive agencies in the use of appropriated funds to acquire supplies and services.

- b. The DOD, NASA, and the General Services Administration (GSA) issue the FAR jointly.
  - c. These agencies publish proposed, interim, and final changes to the FAR in the Federal Register. They issue changes to the FAR in Federal Acquisition Circulars (FACs).
- 2. Agency regulations. The FAR system consists of the FAR and the agency regulations that implement or supplement it. The following regulations supplement the FAR.
  - a. Defense Federal Acquisition Regulation Supplement (DFARS), codified at 48 C.F.R., chapter 2. The Defense Acquisition Regulation (DAR) Council publishes DFARS changes/proposed changes in the Federal Register, and issues them as Defense Acquisition Circulars (DACs).
  - b. Army Federal Acquisition Regulation Supplement (AFARS).
  - c. Air Force Federal Acquisition Regulation Supplement (AFFARS).
  - d. Navy Acquisition Procedures Supplement (NAPS).
  - e. The AFARS, AFFARS, and NAPS are not codified in the C.F.R. The military departments do not publish changes to these regulations in the Federal Register but, instead, issue them pursuant to departmental procedures.
- 3. Major command and local command regulations.



## **V. AUTHORITY OF PERSONNEL.**

### **A. Contracting Authority.**

#### **1. Agency Head.**

- a. The FAR vests contracting authority in the head of the agency. FAR 1.601(a). Within DOD, the heads of the agencies are the Secretaries of Defense, the Army, the Navy, and the Air Force. DFARS 202.101.
- b. In turn, the head of the agency may establish subordinate contracting activities and delegate broad contracting authority to the heads of the subordinate activities. FAR 1.601(a).

#### **2. Heads of Contracting Activities (HCAs).**

- a. HCAs have overall responsibility for managing all contracting actions within their activities.
- b. There are approximately 65 DOD contracting activities, plus others who possess contracting authority delegated by the heads of the various defense agencies. Examples of DOD contracting activities include Army Forces Command, Naval Air Systems Command, and Air Force Materiel Command. DFARS 202.101.
- c. HCAs are contracting officers by virtue of their position. See FAR 1.601; FAR 2.101.

d. HCAs may delegate some of their contracting authority to deputies.

(1) In the Army, HCAs appoint a Principal Assistant Responsible for Contracting (PARC) as the senior staff official of the contracting function within the contracting activity. The PARC has direct access to the HCA and should be one organizational level above the contracting office(s) within the HCA's command. AFARS 5101.601(4).

(2) The Air Force and the Navy also permit delegation of contracting authority to certain deputies. AFFARS 5301.601-92; NAPS 5201.603-1.

3. Contracting officers.

a. Agency heads or their designees select and appoint contracting officers. Appointments are made in writing using the SF 1402, Certificate of Appointment. Delegation of micropurchase authority shall be in writing, but need not be on a SF 1402. FAR 1.603-3.

b. Contracting officers may bind the government only to the extent of the authority delegated to them on the SF 1402. Information on a contracting officer's authority shall be readily available to the public and agency personnel. FAR 1.602-1(a).

4. Contracting Officer Representatives (COR).

a. Contracting officers may authorize selected individuals to perform specific technical or administrative functions relating to the contract. A COR may also be referred to as a Contracting Officer's Technical Officer (COTR) or Quality Assurance Representative (QAR).

- b. Typical COR designations do not authorize CORs to take any action, such as modification of the contract, that obligates the payment of money. *See* AFARS 53.9001, Sample COR designation.

B. Actual Authority.

- 1. The government is bound only by government agents acting within the actual scope of their authority to contract. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947) (government agent lacked authority to bind government to wheat insurance contract not authorized under Wheat Crop Insurance Regulations); *Hawkins & Powers Aviation, Inc. v. United States*, 46 Fed. Cl. 238 (2000) (assistant director of Forest Service lacked authority to modify aircraft contract); *Schism v. United States*, 316 F.3d 1259 (Fed. Cir. 2002) (military recruiters lacked the authority to bind the government to promises of free lifetime medical care).
- 2. Actual authority can usually be determined by viewing a contracting officer's warrant or a COR's letter of appointment. *See Farr Bros., Inc.*, ASBCA No. 42658, 92-2 BCA ¶ 24,991 (COR's authority to order suspension of work not specifically prohibited by appointment letter).
- 3. The acts of government agents which exceed their contracting authority do not bind the government. *See HTC Indus., Inc.*, ASBCA No. 40562, 93-1 BCA ¶ 25,560 (contractor denied recovery although contracting officer's technical representative encouraged continued performance despite cost overrun on the cost plus fixed-fee contract); *Johnson Mgmt. Group CFC, Inc. v. Martinez*, 308 F.3d. 1245 (Fed. Cir. 2002) (contracting officer was without authority to waive a government lien on equipment purchased with government funds).

C. Apparent Authority.

- 1. Definition. Authority that a third party reasonably believes an agent has, based on the third party's dealings with the principal. BLACK'S LAW DICTIONARY 128 (7th ed. 1999).

2. The government is not bound by actions of one who has apparent authority to act for the government. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947); *Sam Gray Enters., Inc. v. United States*, 43 Fed. Cl. 596 (1999) (embassy chargé d'affaires lacked authority to bind government); *McAfee v. United States*, 46 Fed. Cl. 428 (2000) (Assistant U.S. Attorney lacked authority to forgive plaintiff's farm loan in exchange for cooperation in foreclosure action); *Austin v. United States*, 51 Fed.Cl. 718 (2002) (employees of the US Marshall Service possessed no authority to bind the government beyond the scope of the Witness Security Program).
3. In contrast, contractors are bound by apparent authority. *American Anchor & Chain Corp. v. United States*, 331 F.2d 860 (Ct. Cl. 1964) (government justified in assuming that contractor's plant manager acted with authority).

**VI. THEORIES THAT BIND THE GOVERNMENT.** The following are often used in combination to support a contractor's claim of a binding contract action.

**A. Implied authority.**

1. Use of this theory requires that the government employee have some actual authority.
2. Courts and boards may find implied authority to contract if the questionable acts, orders, or commitments of a government employee are an integral or inherent part of that person's assigned duties. *See H. Landau & Co. v. United States*, 886 F.2d 322, 324 (Fed. Cir. 1989); *Informant v. United States*, 46 Fed. Cl. 1 (2000) (even though FBI agents lacked actual authority to contract for rewards, government may be liable under theory of "implied actual authority"); *Jess Howard Elec. Co.*, ASBCA No. 44437, 96-2 BCA ¶ 28,345 (contract administrator had implied actual authority to grant contract extension despite written delegation to the contrary); *Sigma Constr. Co.*, ASBCA No. 37040, 91-2 BCA ¶ 23,926 (contract administrator at work site had implied authority to issue change orders issued under exigent circumstance [drying cement]); *Switlik Parachute Co.*, ASBCA No. 17920, 74-2 BCA ¶ 10,970 (quality assurance representative [QAR] had implied authority to order 100% testing of inflatable rafts).

3. The authority of officials subordinate to the contracting officer is derived from the facts of each case, based on the words of the contract and the conduct of the parties during contract administration. *See Jordan & Nobles Constr. Co.*, GSBCA No. 8349, 91-1 BCA ¶ 23,659 (on-site representative had authority to inspect supplies and direct work according to his contract interpretation, making the government liable for direction to contractor to stop rejecting defective brick).

B. Ratification.

1. Formal or Express. FAR 1.602-3 provides the contracting officer with authority to ratify certain unauthorized commitments. *See* section VII, *infra*. *See also, Henke v. United States*, 43 Fed. Cl. 15 (1999); *Khairallah v. United States*, 43 Fed. Cl. 57 (1999) (no ratification of unauthorized commitments by DEA agents).
2. Implied. A court or board may find ratification by implication where a contracting officer has actual or constructive knowledge of the unauthorized commitment and adopts the act as his own. The contracting officer's failure to process a claim under the procedures of FAR 1.602-3 does not preclude ratification by implication. *Reliable Disposal Co.*, ASBCA No. 40100, 91-2 BCA ¶ 23,895 (KO ratified unauthorized commitment by requesting payment of the contractor's invoice); *Tripod, Inc.*, ASBCA No. 25104, 89-1 BCA ¶ 21,305 (KO's knowledge of contractor's complaints and review of inspection reports evidenced implicit ratification); *Digicon Corp. v. United States*, 56 Fed. Cl. 425 (2003) (COFC found "institutional ratification" where Air Force issued task orders and accepted products and services from appellant over a sixteen month period).

C. Imputed Knowledge.

1. This theory is often used when the contractor fails to meet the contractual obligation to give written notice to the contracting officer of, for example, a differing site condition. *Williams v. United States*, 127 F. Supp. 617 (Ct. Cl. 1955) (contracting officer deemed to have knowledge of road paving agreement on Air Force base).

2. When the relationship between two persons creates a presumption that one would have informed the contracting officer of certain events, the boards may impute the knowledge of the person making the unauthorized commitment to the contracting officer. *Sociometrics, Inc.*, ASBCA No. 51620, 99-1 BCA ¶ 30,620 (“While the [contract] option was not formally exercised, the parties conducted themselves as if it was.”); *Leiden Corp.*, ASBCA No. 26136, 83-2 BCA ¶ 16,612, *mot. for recon. denied*, 84-1 BCA ¶ 16,947 (“It would be inane indeed to suppose that [the government inspector] was at the site for no purpose.”)

D. Equitable Estoppel.

1. A contractor’s reasonable, detrimental reliance on statements, actions, or inactions by a government employee may estop the government from denying liability for the actions of that employee. *Lockheed Shipbldg. & Constr. Co.*, ASBCA No. 18460, 75-1 BCA ¶ 11,246, *aff’d on recon.*, 75-2 BCA ¶ 11,566 (government estopped by Deputy Secretary of Defense’s consent to settlement agreement).
2. To prove estoppel in a government contract case, the party must establish:
  - a. Knowledge of the facts by the party to be estopped;
  - b. Intent, by the estopped party, that his conduct shall be acted upon, or actions such that the party asserting estoppel has a right to believe it is so intended;
  - c. Ignorance of the true facts by the party asserting estoppel; and
  - d. Detrimental reliance. *Emeco Industries, Inc. v. United States*, 485 F.2d 652, at 657 (Ct. Cl. 1973).

## VII. UNAUTHORIZED COMMITMENTS.

- A. Definition. An unauthorized commitment is an agreement that is nonbinding solely because the government representative who made it lacked the authority to enter into that agreement. FAR 1.602-3.

B. Ratification.

1. Ratification is the act of approving an unauthorized commitment, by an official who has the authority to do so, for the purpose of paying for supplies or services provided to the government as a result of an unauthorized commitment. FAR 1.602-3(a).
2. The government may ratify unauthorized commitments if:
  - a. The government has received and accepted supplies or services, or the government has obtained or will obtain a benefit from the contractor's performance of an unauthorized commitment;
  - b. At the time the unauthorized commitment occurred, the ratifying official could have entered into, or could have granted authority to another to enter into, a contractual commitment which the official still has authority to exercise;
  - c. The resulting contract otherwise would have been proper if made by an appropriate contracting officer;
  - d. The price is fair and reasonable;
  - e. The contracting officer recommends payment and legal counsel concurs, unless agency procedures expressly do not require such concurrence;
  - f. Funds are available and were available when the unauthorized commitment occurred; and
  - g. Ratification is within limitations prescribed by the agency.

3. Army HCAs may delegate the authority to approve ratification actions, without the authority to redelegate, to the following individuals.
    - a. PARC (for amounts of \$100,000 or less) (AFARS 1.602-3(b)(3)(A)); and
    - b. Chiefs of Contracting Offices (for amounts of \$10,000 or less) (AFARS 1.602-3(b)(3)(B)).
  4. The Air Force and the Navy also permit ratification of unauthorized commitments, but their limitations are different than those of the Army. *See* AFFARS 5301.602-3; NAPS 5201.602-3.
- C. Alternatives to Ratification. If the agency refuses to ratify an unauthorized commitment, a binding contract does not arise. A contractor can pursue one of the following options:
1. Requests for extraordinary contractual relief.
    - a. Contractors may request extraordinary contractual relief in the interest of national defense. Pub. L. No. 85-804 (50 U.S.C. §§ 1431-1435); FAR Part 50.
    - b. FAR 50.302-3 authorizes, under certain circumstances, informal commitments to be formalized for payment where, for example, the contractor, in good faith reliance on a government employee's apparent authority, furnishes supplies or services to the agency.
    - c. Operational urgency may be grounds for formalization of informal commitments under P.L. 85-804. *Vec-Tor, Inc.*, ASBCA Nos. 25807, 26128, 85-1 BCA ¶ 17,755.



2. Doubtful Claims.

- a. Prior to 1995-1996, the Comptroller General had authority under 31 U.S.C. § 3702 to authorize reimbursement on a *quantum meruit* or *quantum valebant* basis to a firm that performed work for the government without a valid written contract.
- b. Under *quantum meruit*, the government pays the reasonable value of services it actually received on an implied, quasi-contractual basis. *Maintenance Svc. & Sales Corp.*, 70 Comp. Gen. 664 (1991).
- c. The GAO used the following criteria to determine justification for payment:
  - (1) The goods or services for which the payment is sought would have been a permissible procurement had proper procedures been followed;
  - (2) The government received and accepted a benefit;
  - (3) The firm acted in good faith; and
  - (4) The amount to be paid did not exceed the reasonable value of the benefit received. *Maintenance Svc. & Sales Corp.*, 70 Comp. Gen. 664 (1991).
- d. Congress transferred the claims settlement functions of the Government Accountability Office to the Office of Management and Budget (OMB), which then further delegated settlement authority. *See* The Legislative Branch Appropriations Act, 1996, Pub. L. 104-53, 109 Stat. 514, 535 (1995); 31 U.S.C. 3702.
- e. The Claims Division at the Defense Office of Hearings and Appeals (DOHA) settles these types of claims for the Department of Defense. DOHA decisions can be found at [www.defenselink.mil/dodgc/doha](http://www.defenselink.mil/dodgc/doha).

3. Contract Disputes Act (CDA) claims. If the contractor believes it can meet its burden in proving an implied-in-fact contract, it can appeal a contracting officer's final decision to the United States Court of Federal Claims or the appropriate board of contract appeals. 41 U.S.C. §§ 601-613; FAR Subpart 33.2.

## **VIII. CONCLUSION.**



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**COMPETITION**

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## **CHAPTER 5**

### **COMPETITION**

**I. INTRODUCTION.** Following this block of instruction, students will understand:

- A. The levels of competition applicable to government contracts.
- B. The statutory and regulatory requirements for full and open competition.
- C. The exceptions to the requirement for full and open competition.
- D. The impact of specifications on competition.

**II. COMPETITION REQUIREMENTS.**

- A. The Competition in Contracting Act of 1984. Pub. L. No. 98-369, Title VII, § 2701, 98 Stat. 1175.
  - 1. Congressional Intent. Congress decided to promote economy, efficiency, and effectiveness in the procurement of supplies and services by requiring agencies to conduct acquisitions on the basis of full and open competition to the maximum extent practicable. The Competition in Contracting Act (CICA) amended several titles of the United States Code, including:
    - a. The Armed Services Procurement Act of 1947. Title 10 U.S.C. §§ 2304-2305 details the competition requirements that apply to the Department of Defense (DOD), the individual military departments, the Department of Transportation (DOT) (e.g., the Coast Guard), and the National Aeronautics and Space Administration (NASA).
    - b. The Federal Property and Administrative Services Act of 1949. Title 41 U.S.C. §§ 253-253a details the competition requirements

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that apply to agencies other than the DOD, the individual military departments, the DOT, and NASA.

- c. The Office of Federal Procurement Policy Act. Title 41 U.S.C. §§ 401-424 details additional competition requirements applicable to all agencies.

- (1) 41 U.S.C. § 404 establishes the Office of Federal Procurement Policy (OFPP) to provide leadership and guidance in the development of procurement policies and systems.
  - (2) 41 U.S.C. § 416 requires agencies to publicize procurement actions by publishing or posting procurement notices.
  - (3) 41 U.S.C. § 418 requires agencies to appoint competition advocates.

- 2. The following sections of the Federal Acquisition Regulation (FAR) – and the corresponding sections of the Defense Federal Acquisition Regulation Supplement (DFARS) and individual service supplements (e.g., the Army Federal Acquisition Regulation Supplement (AFARS)) – implement the statutory requirements:

- a. FAR Part 5 -- Publicizing Contract Actions;
- b. FAR Part 6 -- Competition Requirements;
- c. FAR Part 7 -- Acquisition Planning;
- d. FAR Part 10 -- Market Research;
- e. FAR Part 11 -- Describing Agency Needs;
- f. FAR Part 12 -- Acquisition of Commercial Items; and
- g. FAR Part 13 -- Simplified Acquisition Procedures.

B. Congressional Scheme.

1. The overarching goal of CICA is to achieve competition to the maximum extent practicable.
2. There are three possible levels of competition in the acquisition process.
  - a. Full and Open Competition.
  - b. Full and Open Competition After Exclusion of Sources.
  - c. Other Than Full and Open Competition.
3. Agencies must achieve competition to the maximum extent practicable at each level of competition.

C. Applicability of FAR Part 6. FAR 6.001.

1. The provisions of FAR Part 6 do not apply to the following types of procurements. The FAR provisions that govern these types of procurements set forth the applicable competition requirements:
  - a. Simplified acquisitions. FAR Part 13; American Eurocopter Corp., B-283700, Dec. 16, 1999, 99-2 CPD ¶ 110 (holding that the simplified acquisition of a Bell helicopter was exempt from the statutory requirement for full and open competition). But see L.A. Sys. v. Dep't of the Army, GSBICA No. 13472-P, 96-1 BCA ¶ 28,220 (holding that the Army improperly fragmented its requirements in order to use simplified acquisition procedures and avoid the requirement for full and open competition).
  - b. Contracts awarded using contracting procedures authorized by statute. See, e.g.:
    - (1) 18 U.S.C. §§ 4121-4128 and FAR Subpart 8.6 (acquisitions from Federal Prison Industries, Inc.);
    - (2) FAR Subpart 8.4 (Federal Supply Schedules);

- (3) 41 U.S.C. §§ 46-48c and FAR Subpart 8.7 (acquisitions from nonprofit agencies employing people who are blind or severely disabled).

- c. Contract modifications within the scope of the original contract. AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201 (Fed. Cir. 1993) (holding that a modification adding T3 circuits was within the scope of a comprehensive contract for telecommunication services; reversing G.S.A. Board of Contract Appeals decision granting the protest); VMC Behavioral Healthcare Services v. U.S., 50 Fed. Cl. 328 (2001) (a modification which increased the number of employees on a services contract did not exceed the scope of the original contract when the original solicitation put potential bidders on notice that the number of employees to be covered could have been increased); Northrop Grumman Corp. v. U.S., 50 Fed. Cl. 443 (2001); Phoenix Air Group, Inc. v. U.S., 46 Fed. Cl. 90 (2000) (holding that a modification for flight training services was within the scope of the original contract despite different geographical area); Paragon Systems, Inc., B-284694.2, July 5, 2000, 2000 CPD ¶ 114. But see Makro Janitorial Svcs, Inc., B-282690, Aug. 18, 1999, 99-2 CPD ¶ 39 (holding that a task order for housekeeping services improperly exceeded the scope of a contract for preventive maintenance and inventory); Ervin and Assocs., Inc., B-278850, Mar. 23, 1998, 98-1 CPD ¶ 89 (holding that a task order to support HUD's Portfolio Reengineering/Mark-to-Market Demonstration Program was outside the scope of an accounting support services contract). Recent cases include: CESC Plaza LP v. United States, 52 Fed. Cl. 91 (2002); Northrop Grumman Corp. v. United States, 50 Fed. Cl. 443 (2001); HG Properties A, LP, Comp. Gen. B-290416, B-290416.2, July 25, 2002, 2002 CPD 128; Atlantic Coast Contracting, Inc., Comp. Gen. B-288969.4, June 21, 2002, 2002 CPD 104; Symetrics Industries, Inc., Comp. Gen. B-289606, Apr. 8, 2002, 2002 CPD 65; Engineering and Professional Servs., Inc., Comp. Gen. B-289331, Jan. 28, 2002, 2002 CPD 24; Specialty Marine, Comp. Gen. B-293871, B-293871.2, June 17, 2004, 2004 CPD 130; Information Ventures, Comp. Gen. B-293743, May 20, 2004, 2004 CPD 97; Firearms Training, Comp. Gen. B-292819.2, et al., Apr. 26, 2004, 2004 CPD 107; Computers Universal, Comp. Gen. B-293548, Apr. 9, 2004, 2004 CPD 78; Anteon Corp, Comp. Gen. B-293523, Mar. 29, 2004, 2004 CPD 51; CourtSmart Digital, Comp. Gen. B-292995.2, B-292995.3, Feb. 13, 2004, 2004 CPD 79.
- d. Orders placed under requirements or definite-quantity contracts.



- e. Orders placed under indefinite-quantity contracts entered into pursuant to FAR Part 6. Corel Corp., B-283862, Nov. 18, 1999, 99-2, CPD ¶ 90; Corel Corp. v. United States, Civil Action No. 99-3348, (D.D.C., Mem. Op. & Order filed Sept. 17, 2001), at <http://www.dcd.uscourts.gov/99-3348.pdf>. But see Electro-Voice, Inc., B-278319, B-278319.2, Jan. 15, 1998, 98-1 CPD ¶ 23 (holding that orders which implement a “downselect” that result in the elimination of a vendor to which a delivery order contract has been issued from consideration for future orders are not exempt from competition requirements).
- f. Orders placed under task or delivery order contracts entered into pursuant to FAR Subpart 16.5.

2. Reprocurement Contracts. FAR 49.402-6.

- a. If the repurchase quantity is less than or equal to the terminated quantity, the contracting officer can use any acquisition method the contracting officer deems appropriate; however, the contracting officer must obtain competition to the maximum extent practicable.
  - (1) The GAO will review the reasonableness of an agency’s acquisition method against the standard specified in FAR 49.402-6(b). See International Tech. Corp., B-250377.5, Aug. 18, 1993, 93-2 CPD ¶ 102 (recognizing that “the statutes and regulations governing regular procurements are not strictly applicable to reprocurements after a default”).
  - (2) If there is a relatively short time between the original competition and the default, it is reasonable to award to the second or third lowest offeror of the original solicitation at its original price. Vereinigte Geb Udereinigungsgesellschaft, B-280805, Nov. 23, 1998, 98-2 CPD ¶ 117 (holding that an agency could modify the contract requirements in its reprocurement without resolicitation); Performance Textiles, Inc., B-256895, Aug. 8, 1994, 94-2 CPD ¶ 65; DCX, Inc., B-232672, Jan. 23, 1989, 89-1 CPD ¶ 55.
- b. If the repurchase quantity is greater than the terminated quantity, the contracting officer must treat the entire quantity as a new acquisition subject to the normal competition requirements.

- c. Contracting officers have wide latitude to decide whether to solicit the defaulted contractor. Montage, Inc., B-277923.2, Dec. 29, 1997, 97-2 CPD ¶ 176; ATA Defense Indus., Inc., B-275303, Feb. 6, 1997, 97-1 CPD ¶ 61.
- 3. The Competition in Contracting Act (and therefore FAR Part 6) does not apply to all federal agencies. CICA does not apply to the U.S. Postal Service, United States v. Elec. Data Sys. Fed. Corp., 857 F.2d 1444, 1446 (Fed. Cir. 1988), or to the Federal Aviation Administration, 49 U.S.C. 40110(d).
- D. Full and Open Competition. 10 U.S.C. § 2304(a)(1); 41 U.S.C. § 253(a)(1); FAR Subpart 6.1.
  - 1. Definition. 41 U.S.C. § 403 and FAR 2.101.
    - a. “Full and open competition” refers to a contract action in which all responsible sources are permitted to compete.
    - b. Full and open competition may not actually achieve competition.
  - 2. Policy. FAR 6.101.
    - a. Contracting officers must promote full and open competition by using competitive procedures to solicit offers and award contracts unless they can justify using full and open competition after exclusion of sources (FAR Subpart 6.2), or other than full and open competition (FAR Subpart 6.3).
    - b. Contracting officers must use the competitive procedure that is best suited to the particular contract action.
  - 3. Examples of competitive procedures that promote full and open competition include:
    - a. Sealed bidding. FAR Part 14.

- b. Contracting by negotiation. FAR Part 15.
  - c. Combinations (e.g., two-step sealed bidding). FAR Part 14.5.
- 4. Unfair Competitive Advantage. Competition must be conducted on an equal basis. Bath Iron Works Corp., B-290470; B-290470.2, 2002 U.S. Comp. Gen. LEXIS 122 (Aug. 19, 2002) (“Offerors must be treated equally and be provided with a common basis” to prepare their offers). An “unfair competitive advantage” can arise in a variety of different factual contexts:
  - a. Organizational Conflict of Interest. FAR Part 9.5. An organizational conflict of interest occurs where, because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the government, or the person's objectivity in performing the contract work is or might otherwise be impaired, or a person has an unfair competitive advantage. Federal Acquisition Regulation (FAR) § 9.501. Contracting officials are to avoid, neutralize or mitigate potential significant conflicts of interest so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR § 9.504(a)(2). Deutsch Bank, B-289111, 2001 CPD ¶ 210 (Dec. 12, 2001).
  - b. An unfair competitive advantage exists where a contractor competing for award of any Federal contract possesses --(1) Proprietary information that was obtained from a Government official without proper authorization; or (2) Source selection information (as defined in 2.101) that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract. FAR 9.505(b).

E. Full and Open Competition After Exclusion of Sources. 10 U.S.C. § 2304(b); 41 U.S.C. § 253(b); FAR Subpart 6.2; DFARS Subpart 206.2.

1. Policy. FAR 6.201.

- a. Under limited circumstances, a contracting officer may exclude one or more sources from a particular contract action.
- b. After excluding these sources, a contracting officer must use competitive procedures that promote full and open competition.

2. A contracting officer may generally exclude one or more sources under two circumstances.

- a. Establishing or maintaining alternative sources for supplies or services. FAR 6.202; DFARS 206.202.

(1) The agency head must determine that the exclusion of one or more sources will serve one of six purposes.

- (a) Increase or maintain competition and probably result in reduced overall costs.
- (b) Enhance national defense by ensuring that facilities, producers, manufacturers, or suppliers are available to furnish necessary supplies and services in the event of a national emergency or industrial mobilization. Hawker Eternacell, Inc., B-283586, 1999 U.S. Comp. Gen. LEXIS 202 (Nov. 23, 1999); Right Away Foods Corp., B-219676.2, B-219676.3, Feb. 25, 1986, 86-1 CPD ¶ 192; Martin Elecs. Inc., B-219803, Nov. 1, 1985, 85-2 CPD ¶ 504.

- (c) Enhance national defense by ensuring that educational institutions, nonprofit institutions, or federally funded research and development centers will establish and maintain essential engineering, research, and development capabilities.
    - (d) Ensure the continuous availability of a reliable source of supply.
    - (e) Satisfy projected needs based on historical demand.
    - (f) Satisfy a critical need for medical, safety, or emergency supplies.
  - (2) The agency head must support the decision to exclude one or more sources with written determinations and findings (D&F). See generally FAR Subpart 1.7; see also DFARS 206.202 (providing sample format and listing required contents).
    - (a) The agency head or his designee must sign the D&F.
    - (b) The agency head cannot create a blanket D&F for similar classes of procurements.
- b. Set-asides for small businesses. FAR 6.203; DFARS 206.203.
- (1) A contracting officer may limit competition to small business concerns to satisfy statutory or regulatory requirements. See FAR Subpart 19.5.
  - (2) The contracting officer is not required to support the determination to set aside a contract action with a separate written justification or D&F.
  - (3) Competition under FAR 6.203 cannot be restricted to only certain small businesses. Department of the Army Request for Modification of Recommendation, Comp. Gen. B-290682.2, Jan. 9, 2003, 2003 CPD ¶ 23 (CICA allows for the exclusion of non-small business concerns to further the

Small Business Act, but it still requires “competitive procedures” for small business set-asides. Such procedures must allow all responsible eligible business concerns [i.e., small business concerns] to submit offers.)

F. Other Than Full and Open Competition. 10 U.S.C. § 2304(c); 41 U.S.C. § 253(c); FAR Subpart 6.3; DFARS Subpart 206.3; AFARS Subpart 6.3.

1. Policy. FAR 6.301.

- a. Executive agencies cannot contract without providing for full and open competition unless one of the statutory exceptions listed in FAR 6.302 applies.
- b. A contract awarded without full and open competition must reference the applicable statutory exception.
- c. Agencies cannot justify contracting without providing for full and open competition based on:
  - (1) A lack of advance planning. 10 U.S.C. § 2304(f)(5)(A); FAR 6.301(c)(1); Signals and Systems, Inc. B-288107, 2001 U.S. Comp. Gen. LEXIS 149 (Sept., 21, 2001); TLC Servs., Inc., B-252614, June 22, 1993, 93-1 CPD ¶ 481.. Cf. Diversified Tech. & Servs. of Virginia, Inc., B-282497, July 19, 1999, 99-2 CPD ¶ 16 (refusing to fault the Department of Agriculture where the procurement was delayed by the agency’s efforts to implement a long-term acquisition plan); Bannum, Inc., Comp. Gen. B-289707, Mar. 14, 2002, 2002 CPD 61 (while the agency’s planning ultimately was unsuccessful, this was due to unanticipated events, not a lack of planning).
  - (a) To avoid a finding of “lack of advanced planning” agencies must make reasonable efforts to obtain competition. Heros, Inc., Comp. Gen. B-292043, June 9, 2003, 2003 CPD ¶ 111 (Agencies “must act affirmatively to obtain and safeguard competition; they cannot take a passive approach and remain in a sole source situation when they could reasonably take steps to enhance competition.”)

- (2) Concerns regarding the availability of funds. 10 U.S.C. § 2304(f)(5)(A); FAR 6.301(c)(2). Cf. AAI ACL Tech., Inc., B-258679.4, Nov. 28, 1995, 95-2 CPD ¶ 243 (distinguishing the expiration of funds from the unavailability of funds).
  - d. The contracting officer must solicit offers from as many potential sources as is practicable under the circumstances. See Kahn Indus., Inc., B-251777, May 3, 1993, 93-1 CPD ¶ 356 (holding that it was unreasonable to deliberately exclude a known source simply because other agency personnel failed to provide the source's telephone number).
  - e. If possible, the contracting officer should use competitive procedures that promote full and open competition.
2. There are seven statutory exceptions to the requirement to provide for full and open competition.
- a. Only One Responsible Source and No Other Supplies or Services Will Satisfy Agency Requirements. 10 U.S.C. § 2304(c)(1); 41 U.S.C. § 253(c)(1); FAR 6.302-1; DFARS 206.302-1; AFARS 6.302-1.
    - (1) DOD, NASA, and the Coast Guard. The agency is not required to provide for full and open competition if:
      - (a) There is only one or a limited number of responsible sources; and
      - (b) No other supplies or services will satisfy the agency's requirements.

(c) Cubic Defense Sys. Inc. v. United States, 45 Fed. Cl. 239 (1999); Metric Sys. Corp. v. United States, 42 Fed. Cl. 306 (1998); Datacom, Inc., B-274175 et al., Nov. 25, 1996, 96-2 CPD ¶ 199; Nomura Enter., Inc., B-260977.2, Nov. 2, 1995, 95-2 CPD ¶ 206; Masbe Corp. Ltd., B-206253.2, May 22, 1995, 95-1 CPD ¶ 253. But see, Lockheed Martin Systems Integration—Owego, B-287190.2, B-287190.3, 2001 CPD ¶ 110, 2001 U.S. Comp. Gen. LEXIS 103 (May 25, 2001) (when an agency relies on this exception, the agency must give other sources “notice of its intentions, and an opportunity to respond to the agency’s requirements.” The agency must “adequately apprise” prospective sources of its needs so that those sources have a “meaningful opportunity to demonstrate their ability” to satisfy the agency’s needs. When the agency gave “misleading guidance” which prejudiced the protestor, GAO invalidated the sole source award.); National Aerospace Group, Inc., B-282843, 1999 U.S. Comp. Gen. LEXIS 151 (Aug. 30, 1999) (sustaining protest where the Defense Logistics Agency’s documentation failed to show that only the specific product would satisfy the agency’s need).

(2) Other Agencies. The agency is not required to provide for full and open competition if:

(a) There is only one responsible source; and

(b) No other supplies or services will satisfy the agency’s requirements.

(c) Information Ventures, Inc., B-246605, Mar. 23, 1992, 92-1 CPD ¶ 302.

b. Unusual or Compelling Urgency. 10 U.S.C. § 2304(c)(2); 41 U.S.C. § 253(c)(2); FAR 6.302-2; DFARS 206.302-2; AFARS 6.302-2. An agency is not required to provide for full and open competition if:

(1) Its needs are of unusual and compelling urgency; and

(2) The government will be seriously injured unless the agency can limit the number of sources from which it solicits offers.



The DFARS PGI provides:

206.302-2 Unusual and compelling urgency.

(b) Application. The circumstances under which use of this authority may be appropriate include, but are not limited to, the following:

(i) Supplies, services, or construction needed at once because of fire, flood, explosion, or other disaster.

(ii) Essential equipment or repair needed at once to— (A) Comply with orders for a ship; (B) Perform the operational mission of an aircraft; or (C) Preclude impairment of launch capabilities or mission performance of missiles or missile support equipment.

(iii) Construction needed at once to preserve a structure or its contents from damage.

See, Parmatic Filter Corp., B-283645, B-283645-2, 1999 U.S. Comp. Gen. LEXIS 238 (Dec. 20, 1999); Ervin & Assocs., Inc., B-275693, Mar. 17, 1997, 97-1 CPD ¶ 111; BlueStar Battery Sys. Corp., B-270111.2, B-270111.3, Feb. 12, 1996, 96-1 CPD ¶ 67. But see, Signals and Systems, Inc., B-288107, 2001 U.S. Comp. Gen. LEXIS 149 (Sept., 21, 2001) (“urgency justification cannot support the procurement of more than the minimum quantity needed to satisfy the immediate urgent requirement.” Since the Army did not know how many items it needed to replace, the Army also could not know what “minimum quantity” it needed. Further, the Army made no reasonable effort to discover how many items would have to be replaced. Therefore, GAO sustained the protest that the Army purchased more units than were necessary); National Aerospace Group, Inc., B-282843, Aug. 30, 1999, 99-2 CPD ¶ 43 (holding that agency documentation failed to show that need was of an unusual and compelling urgency); K-Whit Tools, Inc., B-247081, Apr. 22, 1992, 92-1 CPD ¶ 382 (holding that the “urgency” that justified use of noncompetitive procedures resulted from agency’s lack of advance planning).

c. Industrial Mobilization, Engineering, Developmental, or Research Capability, Expert Services. 10 U.S.C. § 2304(c)(3); 41 U.S.C. § 253(c)(3); FAR 6.302-3; AFARS 6.302-3. An agency is not required to provide for full and open competition if it must limit competition to:

(1) Maintain facilities, producers, manufacturers, or suppliers to furnish supplies or services in the event of a national

emergency or industrial mobilization. Greenbrier Indus., B-248177, Aug. 5, 1992, 92-2 CPD ¶ 74. Cf. Outdoor Venture Corp., B-279777, July 17, 1998, 98-2 CPD ¶ 2 (permitting the DLA to exercise an option for tents at a lower price because it awarded the initial contract on a sole-source basis to an industrial mobilization base producer).

- (2) Ensure that educational institutions, nonprofit institutions, or federally funded research and development centers will establish and maintain essential engineering, research, and development capabilities.
  - (3) Acquire the services of an expert for litigation. See SEMCOR, Inc.; HJ Ford Assocs. Inc., B-279794, B-279794.2, B-279794.3, July 23, 1998, 98-2 CPD ¶ 43 (defining “expert”).
- d. International Agreement. 10 U.S.C. § 2304(c)(4); 41 U.S.C. § 253(c)(4); FAR 6.302-4. An agency is not required to provide for full and open competition if it is precluded by:
- (1) An international agreement or treaty (e.g., a status of forces agreement (SOFA)); or
  - (2) The written direction of a foreign government that will reimburse the agency for its acquisition costs (e.g., pursuant to a foreign military sales agreement). See Electro Design Mfg., Inc., B-280953, Dec. 11, 1998, 98-2 CPD ¶ 142 (upholding agency’s decision to combine system requirements into single procurement at foreign customer’s request); Goddard Indus., Inc., B-275643, Mar. 11, 1997, 97-1 CPD ¶ 104; Pilkington Aerospace, Inc., B-260397, June 19, 1995, 95-2 CPD ¶ 122.
- e. Authorized or required by statute. 10 U.S.C. § 2304(c)(5); 41 U.S.C. § 253(c)(5); FAR 6.302-5; DFARS 206.302-5. An agency is not required to provide for full and open competition if:
- (1) A statute authorizes or requires the agency to procure the supplies or services from a specified source.<sup>1</sup> See, e.g.,

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<sup>1</sup> DFARS 206.302-5 generally permits agencies to use this authority to acquire: (1) supplies and services from military exchange stores outside the United States for use by armed forces stationed outside the United States pursuant to 10 U.S.C. § 2424(a); and (2) police, fire protection, airfield operation, or other community services from local governments at certain military installations that are being closed. However, DFARS 206.302-5 also limits the

18 U.S.C. §§ 4121-4128; 41 U.S.C. §§ 46-48c; FAR Subpart 8.6 (acquisitions from Federal Prison Industries, Inc.); FAR Subpart 8.7 (acquisitions from nonprofit agencies employing people who are blind or severely disabled); see also JAFIT Enter., Inc., B-266326, Feb. 5, 1996, 96-1 CPD ¶ 39.

- (2) The agency needs a brand name commercial item for authorized resale. Defense Commissary Agency – Request for Advance Decision, B-262047, Feb. 26, 1996, 96-1 CPD ¶ 115.
- f. National Security. 10 U.S.C. § 2304(c)(6); 41 U.S.C. § 253(c)(6); FAR 6.302-6. An agency is not required to provide for full and open competition if disclosure of the government’s needs would compromise national security. However, the mere fact that an acquisition is classified, or requires contractors to access classified data to submit offers or perform the contract, does not justify limiting competition.
- g. Public Interest. 10 U.S.C. § 2304(c)(7); 41 U.S.C. § 253(c)(7); FAR 6.302-7; DFARS 206.302-7. An agency is not required to provide for full and open competition if the agency head determines that full and open competition is not in the public interest.
  - (1) The agency head (i.e., the Secretary of Defense for all defense agencies) must support the determination to use this authority with a written D&F.
  - (2) The agency must notify Congress at least 30 days before contract award. Northrop Grumman Corp. v. United States, 46 Fed. Cl. 622 (2000) (holding that NASA’s use of the public interest exception required Congressional **notice**, and not Congressional **consent**). See also, Spherix, Inc. v. United States, 58 Fed. Cl. 351 (2003).
- 3. Justifications and Approvals (J&As) for Other Than Full and Open Competition. FAR 6.303; FAR 6.304; DFARS 206.303; DFARS 206.304; AFARS 5106.303; AFARS 5106.304. Two helpful J&A Guides are: Air Force Guide to Developing and Processing Justification and

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ability of agencies to use this authority to award certain research and development contracts to colleges and universities. See 10 U.S.C. § 2424(b) (limiting the authority granted by 10 U.S.C. § 2424(a)).

Approval (J&A) Documents, available at <http://www.safaq.hq.af.mil/contracting/toolkit/part06/word/5306-j-and-a.doc> and Air Force Materiel Command Justification and Approval Preparation Guide and Template ), available at <https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/PK/pkp/polvault/guides/jaguide.doc>.

- a. Basic Requirements. FAR 6.303-1(a); AFARS 6.303-1(a). The contracting officer must prepare a written justification, certify its accuracy and completeness, and obtain all required approvals before negotiating or awarding a contract using other than full and open competitive procedures.
  - (1) Individual v. Class Justification. FAR 6.303-1(c); DFARS 206.303-1; AFARS 6.303-1(c). The contracting officer must prepare the justification on an individual basis for contracts awarded pursuant to the “public interest” exception (FAR 6.302-7). Otherwise, the contracting officer may prepare the justification on either an individual or class basis.
  - (2) Ex Post Facto Justification. FAR 6.303-1(e); AFARS 6.303-1(e). The contracting officer may prepare the written justification within a reasonable time after contract award if:<sup>2</sup>
    - (a) The contract is awarded pursuant to the “unusual and compelling urgency” exception (FAR 6.302-2); and
    - (b) Preparing the written justification before award would unreasonably delay the acquisition.
  - (3) Requirement to Amend the Justification. AFARS 6.303-1-90. The contracting officer must prepare an amended J&A if:
    - (a) An increase in the estimated dollar value of the contract causes the agency to exceed the approval authority of the previous approval official;

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<sup>2</sup> If the contract exceeds \$50,000,000, the agency must forward the justification to the approval authority within 30 working days of contract award. AFARS 5106.303-1(d).

- (b) A change in the agency's competitive strategy reduces competition; or
  - (c) A change in the agency's requirements affects the basis for the justification.
- b. Contents. FAR 6.303-2; DFARS 206.303-2; AFARS 6.303-2.
  - (1) Format. AFARS 53.9005.<sup>3</sup>
  - (2) The J&A should be a stand-alone document. DFARS 206.303-2. Sabreliner Corp., B-288030, Sep. 13, 2001, 2001 Comp. Gen. LEXIS 154 (inaccuracies and inconsistencies in the J & A and between the J & A and other documentation invalidated the sole source award).
    - (a) Each justification must contain sufficient information to justify the use of the cited exception. FAR 6.303-2(a).
    - (b) The J&A must document and adequately address all relevant issues.
  - (3) At a minimum, the justification must:
    - (a) Identify the agency, contracting activity, and document;
    - (b) Describe the action being approved;<sup>4</sup>
    - (c) Describe the required supplies or services and state their estimated value;
    - (d) Identify the applicable statutory exception;

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<sup>3</sup> The format specified in AFARS 53.9005 is mandatory for contract actions greater than \$50,000,000.

<sup>4</sup> The justification should identify the type of contract, type of funding, and estimated share/ceiling arrangements, if any. AFARS 53.9005.

- (e) Demonstrate why the proposed contractor's unique qualifications and/or the nature of the acquisition requires the use of the cited exception;
- (f) Describe the efforts made to solicit offers from as many potential sources as practicable;<sup>5</sup>
- (g) Include a contracting officer's determination that the anticipated cost to the government will be fair and reasonable;
- (h) Describe any market research conducted, or state why no market research was conducted;
- (i) Include any other facts that justify the use of other than full and open competitive procedures, such as:
  - (i) An explanation of why the government has not developed or made available technical data packages, specifications, engineering descriptions, statements of work, or purchase descriptions suitable for full and open competition, and a description of any planned remedial actions;
  - (ii) An estimate of any duplicative cost to the government and how the estimate was derived if the cited exception is the "sole source" exception (FAR 6.302-1);
  - (iii) Data, estimated costs, or other rationale to explain the nature and extent of the potential injury to the government if the cited

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<sup>5</sup> The justification should indicate: (1) whether the Commerce Business Daily (CBD) notice was (will be) published; and, if not (2) which exception under FAR 5.202 applies. FAR 6.303-2; AFARS 53.9005.

exception is the “unusual and compelling urgency” exception (FAR 6.302-2).<sup>6</sup>

- (j) List any sources that expressed an interest in the acquisition in writing;<sup>7</sup>
  - (k) State any actions the agency may take to remove or overcome barriers to competition for future acquisitions; and
  - (l) Include a certification that the justification is accurate and complete to the best of the contracting officer’s knowledge and belief.
- (4) Each justification must also include a certificate that any supporting data provided by technical or requirements personnel is accurate and complete to the best of their knowledge and belief. FAR 6.303-2(b).
- c. Approval. FAR 6.304(a); DFARS 206.304; AFARS 6.304.
  - (1) The appropriate official must approve the justification in writing.
  - (2) Approving officials.
    - (a) The approval official for proposed contract actions not exceeding \$500,000 is the contracting officer.
    - (b) The approval official for proposed contract actions greater than \$500,000, but not exceeding \$10,000,000, is normally the competition advocate.<sup>8</sup>

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<sup>6</sup> The justification should include a description of the procurement history and the government’s plan to ensure that the prime contractor obtains as much competition as possible at the subcontractor level if the cited exception is the “sole source” section (FAR 6.302-1). AFARS 53.9005.

<sup>7</sup> If applicable, state: “To date, no other sources have written to express an interest.” AFARS 53.9005. See Centre Mfg. Co., Inc., B-255347.2, Mar. 2, 1994, 94-1 CPD ¶ 162 (denying protest where agency’s failure to list interested sources did not prejudice protester).

- (c) The approval official for proposed contract actions greater than \$10,000,000, but not exceeding \$50,000,000 (most agencies) or \$75,000,000 (DoD, NASA, Coast Guard) is the head of the contracting activity or his designee.<sup>9</sup>
- (d) The approval official for proposed contract actions greater than \$50,000,000 (most agencies) or \$75,000,000 (DoD, NASA, Coast Guard) is the agency's senior procurement executive.<sup>10</sup>
- (3) The justification for a contract awarded pursuant to the "public interest" exception (FAR 6.302-7) is considered approved when the D&F is signed. FAR 6.304(b).
- (4) The agency must determine the appropriate approval official for a class justification based on the total estimated value of the class. FAR 6.304(c).
- (5) The agency must include the estimated dollar value of all options in determining the appropriate approval level. FAR 6.304(d).

### **III. IMPLEMENTATION OF COMPETITION REQUIREMENTS.**

- A. Competition Advocates. 41 U.S.C. § 418; FAR Subpart 6.5; AFARS Subpart 6.5; AR 715-31, Army Competition Advocacy Program; AFI 63-301, Air Force Competition Advocacy.
  - 1. Requirement. FAR 6.501; AFARS 6.501. The head of each agency must designate a competition advocate for the agency itself, and for each

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<sup>8</sup> A higher level official can withhold approval authority. See FAR 6.304(a)(2).

<sup>9</sup> The designee must be a general officer, a flag officer, or a GS-16 or above. FAR 6.304(a)(3).

<sup>10</sup> The approval authority within DOD is the Under Secretary of Defense (Acquisition & Technology); however, the Under Secretary may delegate this authority to: (1) an Assistant Secretary of Defense; or (2) a general officer, flag officer, or civilian employee at least equivalent to a major general. DFARS 206.304.



procuring activity within the agency.<sup>11</sup> The designated officer or employee must:

- a. Not be the agency's senior procurement executive;
- b. Not be assigned duties or responsibilities that are inconsistent with the duties and responsibilities of a competition advocate; and
- c. Be provided with whatever staff or assistance is necessary to carry out the duties and responsibilities of a competition advocate (e.g., specialists in engineering, technical operations, contract administration, financial management, supply management, and utilization of small and small disadvantaged business concerns).

2. Duties and Responsibilities. FAR 6.502. Competition advocates must generally challenge barriers to and promote the acquisition of commercial items and the use of full and open competitive procedures. For example, competition advocates must challenge unnecessarily restrictive statements of work, unnecessarily detailed specifications, and unnecessarily burdensome contract clauses.

- a. Agency Competition Advocates. FAR 6.502(b). Agency competition advocates must:
  - (1) Review the agency's contracting operations and identify conditions or actions that unnecessarily restrict the acquisition of commercial items and the use of full and open competitive procedures;
  - (2) Prepare and submit an annual report to the agency senior procurement executive; and
  - (3) Recommend goals and plans for increasing competition.
- b. Special Competition Advocates. AFARS 6.502; AR 715-31, para. 1.13. Special competition advocates oversee Major Army Command/Major Subordinate Command (MACOM/MSC) Competition Advocacy Programs. Their duties include, but are not

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<sup>11</sup> The ASA (ALT) appoints the Army Competition Advocate General. The Deputy Assistant Secretary of the Army for Procurement (SAAL-ZP) is the Army Competition Advocate General (ACAG). AFARS 6.501.

necessarily limited to, the duties set forth in FAR 6.502 and AFARS 6.502.

- c. Local Competition Advocates. AR 715-31, para. 1.14. Local competition advocates oversee Competition Advocacy Programs below the MACOM/MSC level for contracts less than \$100,000.
  - 3. A competition advocate's "review" of an agency's procurement is not a substitute for normal bid protest procedures. See Allied-Signal, Inc., B-243555, May 14, 1991, 91-1 CPD ¶ 468 (holding that a contractor's decision to pursue its protest with the agency's competition advocate did not toll the bid protest timeliness requirements). But see Liebert Corp., B-232234.5, Apr. 29, 1991, 91-1 CPD ¶ 413 (holding that a contractor's reasonable reliance on the competition advocate's representations may extend the time for filing a bid protest).
- B. Acquisition Planning. 10 U.S.C. § 2305; 10 U.S.C. § 2377; 41 U.S.C. § 253a; 41 U.S.C. § 264b; FAR Part 7; DFARS Subpart 207.
- 1. Definition. FAR 2.101. "Acquisition planning" is the process of coordinating and integrating the efforts of the agency's acquisition personnel through a comprehensive plan that provides an overall strategy for managing the acquisition and fulfilling the agency's need in a timely and cost effective manner.
  - 2. Policy. FAR 7.102(a). Agencies must perform acquisition planning and conduct market research for all acquisitions to promote:
    - a. The acquisition of commercial or nondevelopmental items to the maximum extent practicable (10 U.S.C. § 2377; 41 U.S.C. § 264b); and
    - b. Full and open competition (or competition to the maximum extent practicable) (10 U.S.C. § 2305(a)(1)(A); 41 U.S.C. § 253a(a)(1)).
  - 3. Timing. FAR 7.104.
    - a. Acquisition planning should begin as soon as the agency identifies its needs.

- b. Agency personnel should avoid issuing requirements on an urgent basis, or with unrealistic delivery or performance schedules.

4. Written Acquisition Plans. FAR 7.105.

- a. Written acquisition plans are not required for every acquisition.
- b. DFARS 207.103(d)(i) requires a written acquisition plan for:
  - (1) Development acquisitions with a total estimated cost of \$5,000,000 or more;
  - (2) Production and service acquisitions with a total estimated cost of \$15,000,000 or more for any fiscal year, or \$30,000,000 or more for the entire contract period, (including options); and
  - (3) Other acquisitions that the agency considers appropriate.
- c. Contents. FAR 7.105. The specific contents of a written acquisition plan will vary; however, it must identify decision milestones and address all the technical, business, management, and other significant considerations that will control the acquisition.

C. Market Research. 10 U.S.C. § 2305; 10 U.S.C. § 2377; 41 U.S.C. §253a; 41 U.S.C. § 264b; FAR Part 10.

- 1. Definition. FAR 2.101. “Market research” refers to the process of collecting and analyzing information about the ability of the market to satisfy the agency’s needs.
- 2. Policy. FAR 10.001.
  - a. Agencies must conduct market research “appropriate to the circumstances” before:
    - (1) Developing new requirements documents;

- (2) Soliciting offers for acquisitions with an estimated value that exceeds the simplified acquisition threshold (\$100,000); and
    - (3) Soliciting offers for acquisitions with an estimated value of less than the simplified acquisition threshold if:
      - (a) Adequate information is not available; and
      - (b) The circumstances justify the cost-, and
      - (c) Before soliciting offers for acquisitions that could lead to a bundled contract (15 U.S.C. 644(e)(2)(A)).
  - b. Agencies must use the results of market research to determine:
    - (1) If sources exist to satisfy the agency's needs;
    - (2) If commercial (or nondevelopmental) items are available that meet (or could be modified to meet) the agency's needs;
    - (3) The extent to which commercial (or nondevelopmental) items can be incorporated at the component level; and
    - (4) The practice(s) of firms engaged in producing, distributing, and supporting commercial items.
- 3. Procedures. FAR 10.002.
  - a. The extent of market research will vary.
  - b. Acceptable market research techniques include:
    - (1) Contacting knowledgeable government and/or industry personnel;
    - (2) Reviewing the results of market research for the same or similar supplies or services;
    - (3) Publishing formal requests for information;

- (4) Querying government data bases;
- (5) Participating in interactive, on-line communications with government and/or industry personnel;
- (6) Obtaining source lists from other sources (e.g., contracting activities, trade associations, etc.);
- (7) Reviewing catalogs and other product literature;
- (8) Conducting interchange meetings; and/or
- (9) Holding pre-solicitation conferences with potential offerors.

D. Developing Specifications. 10 U.S.C. § 2305; 41 U.S.C. § 253a; FAR Part 11; DFARS Part 211.

1. Types of Specifications.

- a. Design specifications. Specifications that set forth precise measurements, tolerances, materials, in-process and finished product tests, quality control measures, inspection requirements, and other specific information. The Government Contracts Reference Book 185-186 (2d Ed. 1998).
- b. Performance specifications. Specifications that indicate what the final product must be capable of accomplishing rather than how the product is to be built. The Government Contracts Reference Book 394 (2d Ed. 1998)
- c. Purchase descriptions. A description of the essential physical characteristics and functions required to meet the government's requirements. The Government Contracts Reference Book 426 (2d Ed. 1998).
  - (1) Brand Name or Equal Purchase Description. Identifies a product by its brand name and model or part number . . . and permits offers on products essentially equal to the specified brand name. The Government Contracts Reference Book 67 (2d Ed. 1998).
- d. Mixed specifications.

2. Policy. Agencies are required to develop specifications that:
  - a. Permit full and open competition;
  - b. State the agency's minimum needs; and
  - c. Include restrictive provisions or conditions only to the extent they satisfy the agency's needs or are required by law.

See Systems Management, Inc., Qualimetrics, Inc., Comp. Gen. B-287032.4; B-287032.4, Apr. 16, 2001, 2001 CPD ¶ 85 (the Air Force violated CICA when it "overstated its minimum needs in requiring" an FAA-certified weather observation system and then "either waived or relaxed this requirement" by awarding to a vendor whose system was not FAA-certified); CHE Consulting, Inc., B-284110 et al., Feb. 18, 2000, 2000 CPD ¶ 51 (holding that requiring offerors to obtain support agreements from 65% of the original equipment manufacturers satisfied a legitimate agency need and did not unduly restrict competition); American Eurocopter Corp., B-283700, Dec. 16, 1999, 99-2 CPD ¶ 110 (holding that requiring a certain model Bell helicopter was a reasonable agency restriction); Instrument Specialists, Inc., B-279714, July 14, 1998, 98-2 CPD ¶ 106 (holding that a mere disagreement with an agency requirement did not make it an unreasonable restriction); APTUS, Co., B-281289, Jan. 20, 1999, 99-1 CPD ¶ 40 (holding that so long as the specification was not unduly restrictive, the agency had the discretion to define its own requirements).

- d. Hot Issue. In FY 2002 alone, the Comptroller General heard nine protests alleging government specifications were "unduly restrictive" and thereby violated CICA. Recent GAO decisions include: C. Lawrence Constr. Co., Inc., B-290709, 2002 U.S. Comp. Gen. LEXIS 140 (Sept. 20, 2002); Vantex Serv. Corp., Comp. Gen. B-290415, Aug. 15, 2002, 2002 CPD ¶ 131; Military Agency Servs. Pty., Ltd., Comp. Gen. B-290414, B-290441, B-290468, B-290496, Aug. 1, 2002, 2002 CPD ¶ 130; Instrument Control Serv., Inc., Comp. Gen. B-289660, B-289660.2, Apr. 15, 2002, 2002 CPD ¶ 66; Mark Dunning Industries, Inc., Comp. Gen. B-289378, Feb. 27, 2002, 2002 CPD ¶ 46; Flowlogic, Comp. Gen. B-289173, Jan. 22, 2002, 2002 CPD ¶ 22; Keystone Ship Berthing, Inc., Comp. Gen. B-289233, Jan. 10, 2002, 2002 CPD ¶ 19; C. Lawrence Constr. Co., Inc., Comp. Gen. B-289341, Jan. 8, 2002,

2002 CPD ¶ 17; Apex Support Servs., Inc., Comp. Gen. B-288936, B-288936.2, Dec. 12, 2001, 2001 CPD ¶ 202.

e. The trend continued in FY 2003. Again, the GAO heard nine protests alleging unduly restrictive specifications: Amer. Artisan Productions, Inc., Comp. Gen. B-292380, July 30, 2003, 2003 CPD ¶ 132; AirTrak Travel, Comp. Gen. B-292101, June 30, 2003, 2003 CPD ¶ 117; Prisoner Transport. Servs., LLC, Comp. Gen. B-292179, et. al., June 27, 2003, 2003 CPD ¶ 121; EDP Enter., Inc., Comp. Gen. B-284533.6, May 19, 2003, 2003 CPD ¶ 93; Atl. Coast Contracting, Inc., Comp. Gen. B-291893, Apr. 24, 2003, 2003 CPD ¶ 87; MCI Worldcom Deutschland GmbH, Comp. Gen. B-291418, et. al., Jan. 2, 2003, 2003 CPD ¶ 1; USA Info. Sys., Inc., Comp. Gen. B-291417, Dec. 30, 2002, 2002 CPD ¶ 224; ABF Freight Sys., Inc., Comp. Gen. B-291185, Nov. 8, 2002, 2002 CPD ¶ 201; Dynamic Instruments, Inc., Comp. Gen. B-291071, Oct. 10, 2002, 2002 CPD ¶ 183.

f. In FY 2004 the Comptroller General considered only four protests alleging unduly restrictive government specifications in violation of the CICA. The GAO denied all four. See, Teximara, Inc., Comp. Gen. B-293221.2, July 9, 2004, 2004 CPD ¶ 151; Reedsport Machine & Fabrication, Comp. Gen. B-293110.2, Apr. 13, 2004, 2004 CPD ¶ 91; Ocean Svs., LLC, Comp. Gen. B-2922511.2, Nov. 6, 2003, 2003 CPD ¶ 206; and, NVT Technologies, Inc., Comp. Gen. B-292302.3, Oct. 20, 2003, 2003 CPD ¶ 174.

3. Compliance with statutory and regulatory competition policy.

a. Specifications must provide a common basis for competition.

b. Competitors must be able to price the same requirement. See Deknatel Div., Pfizer Hosp. Prod. Grp., Inc., B-243408, July 29, 1991, 91-2 CPD ¶ 97 (finding that the agency violated the FAR by failing to provide the same specification to all offerors); see also Valenzuela Eng'g, Inc., B-277979, Jan. 26, 1998, 98-1 CPD ¶ 51 (chastising the Army because its “impermissibly broad” statement of work failed to give potential offerors reasonable notice of the scope of the proposed contract).

4. Common Preaward Problems Relating to Specifications.

a. Brand Name or Equal Purchase Descriptions.

- (1) While the use of performance specifications is preferred to encourage offerors to propose innovative solutions, the use of brand name or equal purchase descriptions may be advantageous under certain circumstances. FAR 11.104(a).
- (2) Brand name or equal purchase descriptions must include, in addition to the brand name, a general description of those salient physical, functional, or performance characteristics of the brand name item that an "equal" item must meet to be acceptable for award. Use brand name or equal descriptions when the salient characteristics are firm requirements. FAR 11.104(b).
  - (a) Failure of a solicitation to list an item's salient characteristics improperly restricts competition by precluding potential offerors of equal products from determining what characteristics are considered essential for its item to be accepted, and cancellation of the solicitation is required. T-L-C Sys, B-227470, Sept. 21, 1987, 87-2 CPD ¶ 283. But see Micro Star Co., Inc., GSBCA No. 9649-P, 89-1 BCA ¶ 21,214 (holding that failing to list salient characteristics merely meant that the protester's bid could not be deemed nonresponsive for failure to meet that particular characteristic).

b. Items Peculiar to one Manufacturer. Agency requirements shall not be written so as to require a particular brand-name, product, or a feature of a product, peculiar to one manufacturer, thereby precluding consideration of a product manufactured by another company, unless --

- (1) The particular brand name, product, or feature is essential to the Government's requirements, and market research indicates other companies' similar products, or products lacking the particular feature, do not meet, or can not be modified to meet, the agency's needs;



- (2) The authority to contract without providing for full and open competition is supported by the required justifications and approvals (see 6.302-1); and
- (3) The basis for not providing for maximum practicable competition is documented in the file when the acquisition is awarded using simplified acquisition procedures. FAR 11.105.

c. Ambiguous Specifications.

- (1) Specifications or purchase descriptions that are subject to two or more reasonable interpretations are ambiguous and require the amendment or cancellation of the solicitation. Arora Group, Inc., B-288127, Sep. 14, 2001, 2001 CPD ¶ 154; ; Flow Tech., Inc., B-228281, Dec. 29, 1987, 67 Comp. Gen. 161, 87-2 CPD ¶ 633. As a general rule, the contracting agency must give offerors sufficient detail in a solicitation to enable them to compete intelligently and on a relatively equal basis. There is no requirement that a competition be based on specifications drafted in such detail as to eliminate completely any risk or remove every uncertainty from the mind of every prospective offeror. RMS Indus., B-248678, Aug. 14, 1992, 92-2 CPD 109.
- (2) Issues raised by ambiguous (defective) specifications:
  - (a) Adequacy of competition.
  - (b) Contract interpretation.
  - (c) Constructive change.

d. Unduly Restrictive Specifications.

- (1) Specifications must promote full and open competition. Agencies may only include restrictive provisions to meet their minimum needs. 10 U.S.C § 2305(a)(1)(B); 41 U.S.C. § 253a(a)(2)(B). See Apex Support Services, Inc., B-288936, B-288936.2, Dec. 12, 2001, 2001 CPD 202 (unnecessary bonding requirements); CHE Consulting, Inc., B-284110 et. al., Feb. 18, 2000, 2000 CPD ¶ 51; Hoechst

Marion Roussel, Inc., B-279073, May 4, 1998, 98-1 CPD ¶ 127 (holding that the VA's decision to restrict solicitation for Diltiazem to lower dosage strengths lacked any basis in the agency's needs); Chadwick-Helmuth Co., Inc., B-279621.2, Aug. 17, 1998, 98-2 CPD ¶ 44 (holding that a requirement for a test instrument capable of operating existing program-specific software was unduly restrictive, where the requirement did not accurately reflect the agency's actual needs); cf. Instrument Specialists, Inc., B-279714, 98-2 CPD ¶ 1 (holding that requirements for monthly service calls and a 15 working day turn-around time for off-site repairs of surgical instruments were not unduly restrictive); Caswell Int'l Corp., B-278103, Dec. 29, 1997, 98-1 CPD ¶ 6 (holding that a requirement to obtain interoperable equipment to ensure operational safety and military readiness was reasonably related to the agency's needs); Laidlaw Envtl., B-272139, Sept. 6, 1996, 96-2 CPD ¶ 109 (holding that a prohibition against using open burn/open detonation technologies to demilitarize conventional munitions was unobjectionable where it reflected Congress' legitimate environmental concerns).

(2) Common examples of restrictive specifications:

- (a) Specifications written around a specific product. Ressler Assoc., B-244110, Sept. 9, 1991, 91-2 CPD ¶ 230.
- (b) Geographical restrictions that limit competition to a single source and do not further a federal policy. But see, e.g., Marlen C. Robb & Son Boatyard & Marina, Inc., B-256316, June 6, 1994, 94-1 CPD ¶ 351 (Denying the protest and providing "an agency properly may restrict a procurement to offerors within a specified area if the restriction is reasonably necessary for the agency to meet its needs. The determination of the proper scope of a geographic restriction is a matter of the agency's judgment which we will review in order to assure that it has a reasonable basis"); H & F Enters., B-251581.2, July 13, 1993, 93-2 CPD ¶ 16.
- (c) Specifications that exceed the agency's minimum needs. But see, Trilectron Indus., B-248475, Aug.

27, 1992, 92-2 CPD ¶ 130 (denying protest and providing “determinations of the agency’s minimum needs and the best method of accommodating those needs are primarily matters within the agency’s discretion. Where, as here, a specification is challenged as unduly restrictive of competition, we will review the record to determine whether the restriction imposed is reasonably related to the agency’s minimum needs.”); CardioMetrix, B-248295, Aug. 14, 1992, 92-2 CPD ¶ 107.

- (d) Requiring approval by a testing laboratory (e.g., Underwriters Laboratory (UL)) without recognizing equivalents. HazStor Co., B-251248, Mar. 18, 1993, 93-1 CPD ¶ 242. But see G.H. Harlow Co., B-254839, Jan 21, 1994, 94-1 CPD ¶ 29 (upholding requirement for approval by testing laboratory for fire alarm and computer-aided dispatch system).
- (e) Improperly bundled specifications. Vantex Serv. Corp., Comp. Gen. B-290415, Aug. 15, 2002, 2002 CPD ¶ 131; EDP Enterprises, Inc., Comp. Gen. B-284533.6, May 19, 2003, 2003 CPD ¶ 93 (bundling food services, with the “unrelated base, vehicle and aircraft maintenance services,” restricted competition; because the agency bundled the requirements for administrative convenience, the specification violated the CICA); But see, AirTrak Travel, Comp. Gen. B-292101, June 30, 2003, 2003 CPD ¶ 117, and USA Info. Sys., Inc., Comp. Gen. B-291417, Dec. 30, 2002, 2002 CPD ¶ 224 (in both decisions GAO denied allegations that bundled specifications violated CICA, because the agencies convinced GAO that mission-related reasons justified bundling requirements).

E. Publicizing Contract Actions. 41 U.S.C. § 416; FAR Part 5; DFARS Subpart 205.

1. Policy. FAR 5.002.

Publicizing contract actions increases competition. FAR 5.002(a). But see Interproperty Investments, Inc., B-281600, Mar. 8, 1999, 99-1 CPD ¶ 55 (holding that an agency's diligent good-faith effort to comply with publicizing requirements was sufficient); Aluminum Specialties, Inc. t/a Hercules Fence Co., B-281024, Nov. 20, 1998, 98-2 CPD ¶ 116 (holding that there was no requirement for the agency to exceed publicizing requirements, even if it had done so in the past).

2. Methods of Disseminating Information. FAR 5.101.

a. FedBizOpps.gov. FAR 5.101(a)(1).

(1) Commerce Business Daily phased out in favor of FedBizOpps.gov.

In the past, synopses were posted in the Commerce Business Daily. Effective 1 October 2001, all agencies had to use one, single electronic portal to publicize government-wide procurements greater than \$25,000. Designated "FedBizOpps.gov," the web site is "the single point where Government business opportunities greater than \$25,000, including synopses of proposed contract actions, solicitations, and associated information, can be accessed electronically by the public." From 1 October 2001 till 1 January 2002, agencies posted their solicitations on FedBizOpps.gov and in the Commerce Business Daily (CBD). Beginning 1 January 2002, agencies no longer needed to post solicitations in the CBD and now agencies may rely solely on the web site. Electronic Commerce in Federal Procurement, 66 Fed. Reg. 27,407 (May 16, 2001) (to be codified at 48 C.F.R. pts. 2, 4-7, 9, 12-14, 19, 22, 34-36).

(2) Contracting officers must synopses proposed contract actions expected to exceed \$25,000 in FedBizOpps.gov. unless:

- (a) The contracting officer determines that one or more of the fourteen exceptions set forth in FAR 5.202 applies (e.g., national security, urgency, etc.).
    - (b) The head of the agency determines that advance notice is inappropriate or unreasonable.
  - (3) Contracting officers must wait at least:
    - (a) 15 days after synopsisizing the proposed contract action to issue the solicitation; and
    - (b) if the proposed action is expected to exceed the simplified acquisition threshold, 30 days after issuing the solicitation to open bids or receive initial proposals. FAR 5.203.
  - (4) Commercial Item Acquisitions
    - (a) CO may establish a shorter period for issuance of the solicitation or use the combined synopsis and solicitation procedure. 5.203(a).
    - (b) CO must establish a reasonable opportunity to respond (rather than the 30 days required for non-commercial items above the simplified acquisition threshold). FAR 5.203(b).
  - (5) The decision not to synopsise a contract action must be proper when the solicitation is issued. American Kleaner Mfg. Co., B-243901.2, Sept. 10, 1991, 91-2 CPD ¶ 235.
  - (6) If the agency fails to synopsise (or improperly synopsisizes) a contract action, the agency may be required to cancel the solicitation. Sunrise Int'l Grp., B-252892.3, Sept. 14, 1993, 93-2 CPD ¶ 160; RJI, B-251436, Mar. 10, 1993, 93-1 CPD ¶ 223. But see, Kendall Healthcare Products Co., B-289381, February 19, 2002, 2002 Comp. Gen. LEXIS 23 (misclassifying procurement in CBD did not deny protestor opportunity to compete).
- b. Posting. FAR 5.101(a)(2).

- (1) Contracting officers must display proposed contract actions expected to fall between \$10,000 and \$25,000 in a public place.
  - (2) The term “public place” includes electronic means of posting information, such as electronic bulletin boards.
  - (3) Contracting officers must display proposed contract actions for 10 days or until bids/offers are opened, whichever is later, beginning no later than the date the agency issues the solicitation.
  - (4) Contracting officers are not required to display proposed contract actions in a public place if the exceptions set forth in FAR 5.102(a)(1), (a)(4) through (a)(9), or (a)(11) apply, or the agency uses an oral or FACNET solicitation.
- c. Handouts, announcements, and paid advertising. FAR 5.101(b).
3. Pre-solicitation Notices. FAR 14.205. A contracting officer may send presolicitation notices to concerns on the solicitation mailing list. The notice shall (a) Specify the final date for receipt of requests for a complete bid set, (b) Briefly describe the requirement and furnish other essential information to enable concerns to determine whether they have an interest in the invitation, and normally not include drawings, plans, and specifications.
4. Solicitation Mailing Lists (Bidders Lists). Prior to 25 August 2003, the FAR required contracting officers to establish solicitation mailing lists to ensure access to adequate sources of supplies and services. The Civilian Agency Acquisition Council and Defense Acquisition Regulations Council eliminated the Standard Form 129 (SF 129), Solicitation Mailing List effective 25 August 2003. The Central Contract Registry, “a centrally located, searchable database, accessible via the Internet,” is a contracting officer’s “tool of choice for developing, maintaining, and providing sources for future procurements.” FedBizOpps.gov, “through its interested vendors list, has the capability to generate a list of vendors who are interested in a specific solicitation.” Federal Acquisition Regulation; Elimination of the Standard Form 129, Solicitation Mailing List Application, 68 Fed. Reg. 43,855 (July 24, 2003). For solicitations that used Solicitation Mailing Lists (i.e. before 25 August 2003), the following rules apply:

- a. Contracting officers may use different portions of large lists for separate acquisitions. However, contracting officers must generally solicit bids from:
- (1) The incumbent. Kimber Guard & Patrol, Inc., B-248920, Oct. 1, 1992, 92-2 BCA ¶ 220. See Qualimetrics, Inc., B-262057, Nov. 16, 1995, 95-2 CPD ¶ 228 (concluding that GSA should have verified mailing list to ensure that incumbent's successor was on it). But see Cutter Lumber Products, B-262223.2, Feb. 9, 1996, 96-1 CPD ¶ 57 (holding that agency's inadvertent failure to solicit incumbent does not warrant sustaining protest where agency otherwise obtained full and open competition).
  - (2) Any contractor added to the list since the last solicitation. Holiday Inn, Inc., B-249673-2, Dec. 22, 1992, 92-2 CPD ¶ 428.
  - (3) All contractors on the segment of the list designated by the contracting officer.

#### **IV. CONCLUSION.**

## **CHAPTER 6**

### **SEALED BIDDING**

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**CHAPTER 6**  
**SEALED BIDDING**

**I. INTRODUCTION.**

*“The purpose of these statutes and regulations is to give all persons equal right to compete for government contracts; to prevent unjust favoritism, or collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the government the benefits which arise from competition. In furtherance of such purpose, invitations and specifications must be such as to permit competitors to compete on a common basis.”*

*United States v. Brookridge Farm, Inc.*, 111 F.2d 461, 463 (10th Cir. 1940).

**II. THREE CONTRACT METHODS.**

- A. Simplified Acquisition Procedures. FAR Part 13.
- B. Sealed Bidding. FAR Part 14.
- C. Negotiations. FAR Part 15.

**III. FRAMEWORK OF THE SEALED BIDDING PROCESS.**

- A. History and Purpose. 2 Stat. 536; 6 Ops. Atty. Gen. 99; 2 Ops. Atty. Gen. 257.
- B. Current Statutes.
  - 1. DoD, Coast Guard, and NASA – Armed Services Procurement Act of 1947, 10 U.S.C. §§ 2301-2331.

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2. Other federal agencies – Federal Property and Administrative Services Act of 1949, 41 U.S.C. §§ 251-261.
3. These parallel statutory structures provide that:
  - a. The head of an agency **shall** solicit sealed bids if—
    - (1) Time permits the solicitation, submission, and evaluation of sealed bids;
    - (2) The award will be made on the basis of price and other price-related factors [*see* FAR 14.201-8];
    - (3) It is not necessary to conduct discussions with the responding sources about their bids; and
    - (4) There is a reasonable expectation of receiving more than one sealed bid.
  - b. The head of an agency shall request competitive proposals if sealed bids are not required. *See Racal Filter Technologies, Inc.*, B-240579, Dec. 4, 1990, 70 Comp. Gen. 127, 90-2 CPD ¶ 453 (sealed bidding required when all elements enumerated in the Competition in Contracting Act (CICA) are present—agencies may not use negotiated procedures); *see also UBX Int’l, Inc.*, B-241028, Jan. 16, 1991, 91-1 CPD ¶ 45 (use of sealed bidding procedures for ordnance site survey was proper).

C. Regulations.

1. FAR Part 14--Sealed Bidding.
2. DoD and agency regulations:
  - a. Defense FAR Supplement (DFARS), Part 214--Sealed Bidding.

- b. Air Force FAR Supplement (AFFARS), Part 314-- Sealed Bidding.
- c. Army FAR Supplement (AFARS), Part 14--Sealed Bidding.
- d. Navy Acquisition Procedures Supplement (NAPS), Part 14--Sealed Bidding.
- e. Defense Logistics Acquisition Regulation (DLAR), Part 5214--Sealed Bidding.

D. Overview of Sealed Bidding Process: The Five Phases. FAR 14.101.

- 1. Preparation of the Invitation for Bids (IFB).
- 2. Publicizing the IFB.
- 3. Submission of Bids.
- 4. Evaluation of Bids.
- 5. Contract Award.

#### **IV. PREPARATION OF INVITATION FOR BIDS.**

A. Format of the IFB.

- 1. Uniform Contract Format. FAR 14.201-1.
- 2. Standard Form 33 - Solicitation, Offer and Award. FAR 53.301-33.
- 3. Standard Form 30 - Amendment of Solicitation; Modification of Contract.

B. B. Specifications.

1. Clear, complete, and definite.
2. Minimum needs of the government.
3. Preference for Commercial Items. FAR 12.000 and FAR 12.101(b).

C. Definition. "Offer" means "bid" in sealed bidding. FAR 2.101.

D. Contract Type: Contracting officers may use only **firm fixed-price** and **fixed-price with economic price adjustment** contracts in sealed bidding acquisitions. FAR 14.104.

V. PUBLICIZING THE INVITATION FOR BIDS.

A. Policy on Publicizing Contract Actions. FAR 5.002. Contracting officers must publicize contract actions to increase competition, broaden industry participation, and assist small business concerns in obtaining contracts and subcontracts. With limited exceptions, contracting officers shall promote **full and open competition**. This means that all responsible sources are permitted to compete. FAR 2.101. *See generally* FAR Subpart 6.1.

B. Methods of Soliciting Potential Bidders. FAR 5.101; FAR 5.102. DoD uses three primary methods to promote competition: the Government Point of Entry, Solicitation or Bidders Mailing Lists, and copies of the solicitations posted in public places.

1. Government Point of Entry (GPE): <http://www.fedbizopps.gov>. FAR Subpart 5.2. The contracting officer may not issue a solicitation until at least 15 days after publication in the GPE. Further, when synopsis in the GPE is required, the contracting officer must give bidders a minimum of 30 days after issuance of the IFB to prepare and submit their bids. These time limits may be shortened when procuring commercial items.

2. Solicitation Mailing Lists (Bidders Mailing Lists). FAR 14.205.
  - a. Prior to 25 August 2003. Contracting activities previously developed sources through the use of the SML. Such lists consisted of firms known to supply particular goods or services. When a requirement existed for an item for which a SML exists, the contracting agency would send copies of the IFB to firms on the list. Failure to solicit a contractor that requested to be included on the list could require resolicitation. *Applied Constr. Tech.*, B-251762, May 4, 1993, 93-1 CPD ¶ 365. If the SML was excessively long, the contracting officer could rotate portions of the list for separate acquisitions. The rules required the contracting officers to use a different portion of large lists for separate acquisitions, solicit any contractor added to the list since the last solicitation, (*Holiday Inn, Inc.*, B-249673-2, Dec. 22, 1992, 92-2 CPD ¶ 428), and solicit the incumbent. *Kimber Guard & Patrol, Inc.*, B-248920, Oct. 1, 1992, 92-2 BCA ¶ 220. *See Qualimetrics, Inc.*, B-262057, Nov. 16, 1995, 95-2 CPD ¶ 228 (concluding that GSA should have verified mailing list to ensure that incumbent's successor was on it). *But see Cutter Lumber Products*, B-262223.2, Feb. 9, 1996, 96-1 CPD ¶ 57 (holding that agency's inadvertent failure to solicit incumbent does not warrant sustaining protest where agency otherwise obtained full and open competition).
  - b. **Effective 25 August 2003**, the Civilian Agency Acquisition Council and Defense Acquisition Regulations Council eliminated the SML and the applicable form, the Standard Form 129 (SF 129). The Central Contract Registry, "a centrally located, searchable database, accessible via the Internet," is a contracting officer's "tool of choice for developing, maintaining, and providing sources for future procurements." FedBizOpps.gov, "through its interested vendors list, has the capability to generate a list of vendors who are interested in a specific solicitation." Federal Acquisition Regulation; Elimination of the Standard Form 129, Solicitation Mailing List Application, 68 Fed. Reg. 43,855 (July 24, 2003).
3. Posting in a Public Place. FAR 5.101. Every proposed contract action expected to exceed \$10,000 but not expected to exceed \$25,000 must be posted in a public place at the contracting office issuing the solicitation not later than the date the solicitation is issued and for at least ten days. Electronic posting may be used to satisfy this requirement.

- C. Late Receipt of Solicitations. Failure of a potential bidder to receive an IFB in time to submit a bid, or to receive a requested solicitation at all, does not require postponement of bid opening **unless** adequate competition is not obtained. *See Family Carpet Serv. Inc.*, B-243942.3, Mar. 3, 1992, 92-1 CPD ¶ 255. *See also Educational Planning & Advice*, B-274513, Nov. 5, 1996, 96-2 CPD ¶ 173 (refusal to postpone bid opening during a hurricane was not an abuse of discretion where adequate competition was achieved and agency remained open for business); *Lewis Jamison Inc. & Assocs.*, B-252198, June 4, 1993, 93-1 CPD ¶ 433 (GAO denies protest where contractor had “last clear opportunity” to avoid being precluded from competing). *But see Applied Constr. Technology*, B-251762, May 4, 1993, 93-1 CPD ¶ 365 (although agency received 10 bids in response to IFB, GAO sustained protest where agency failed to solicit contractor it had advised would be included on its bidder’s mailing list).
- D. Failure to Solicit the Incumbent Contractor. Failure to give notice of a solicitation for supplies or services to a contractor currently providing such supplies or services may be fatal to the solicitation, unless the agency:
1. Made a diligent, good-faith effort to comply with statutory and regulatory requirements regarding notice of the acquisition and distribution of solicitation materials; **and**
  2. Obtained reasonable prices (competition). *Transwestern Helicopters, Inc.*, B-235187, July 28, 1989, 89-2 CPD ¶ 95 (although the agency failed inadvertently to solicit incumbent contractor, the agency made reasonable efforts to publicize the solicitation, which resulted in 25 bids). *But see Professional Ambulance, Inc.*, B-248474, Sep. 1, 1992, 92-2 CPD ¶ 145 (agency failed to solicit the incumbent and received only three proposals; GAO recommended resolicitation).

## VI. SUBMISSION OF BIDS.

- A. Safeguarding Bids. FAR 14.401.
1. Bids (including bid modifications) received before the time set for bid opening generally must remain unopened in a locked box or safe. FAR 14.401.

2. A bidder generally is not entitled to relief if the agency negligently loses its bid. *Vereinigte Gebudereinigungsgesellschaft*, B-252546, June 11, 1993, 93-1 CPD ¶ 454.

B. Method of Submission. FAR 14.301.

1. To be considered for award, a bid must comply in all material respects with the invitation for bids, to include the method of submission, i.e., the bid must be **responsive** to the solicitation. FAR 14.301(a); *LORS Medical Corp.*, B-259829.2, Apr. 25, 1995, 95-1 CPD ¶ 222 (bidder's failure to return two pages of IFB does not render bid nonresponsive; submission of signed SF 33 incorporates all pertinent provisions).
  - a. General Rule - Offerors may submit their bids by any written means permitted by the solicitation.
  - b. Unless the solicitation specifically allows it, the contracting officer may not consider telegraphic bids. FAR 14.301(b); *MIMCO, Inc.*, B-210647.2, Dec. 27, 1983, 84-1 CPD ¶ 22 (telegraphic bid, which contrary to solicitation requirement makes no mention of bidder's intent to be bound by all terms and conditions, is nonresponsive).
  - c. The government will not consider facsimile bids unless permitted by the solicitation. FAR 14.301(c); FAR 14.202-7; *Recreonics Corp.*, B-246339, Mar. 2, 1992, 92-1 CPD ¶ 249 (bid properly rejected for bidder's use of fax machine to transmit acknowledgement of solicitation amendment); *but see Brazos Roofing, Inc.*, B-275113, Jan. 23, 1997, 97-1 CPD ¶ 43 (bidder not penalized for agency's inoperable FAX machine); *PBM Constr. Inc.*, B-271344, May 8, 1996, 96-1 CPD ¶ 216 (ineffective faxed modification had no effect on the original bid, which remained available for acceptance); *International Shelter Sys.*, B-245466, Jan. 8, 1992, 92-1 CPD ¶ 38 (hand-delivered facsimile of bid modification is not a facsimile transmission).



C. Time and Place of Submission. FAR 14.301.

1. Reasons for specific requirements.
  - a. Equality of treatment of bidders.
  - b. Preserve integrity of system.
  - c. Convenience of the government.
2. Place of submission—as specified in the IFB. FAR 14.302(a); *CSLA, Inc.*, B-255177, Jan. 10, 1994, 94-1 CPD ¶ 63; *Carolina Archaeological Serv.*, B-224818, Dec. 9, 1986, 86-2 CPD ¶ 662.
3. Time of submission - as specified in the IFB. FAR 14.302(a).
  - a. The official designated as the bid opening officer shall decide when the time set for bid opening has arrived and shall so declare to those present. FAR 14.402-1; *J.C. Kimberly Co.*, B-255018.2, Feb. 8, 1994, 94-1 CPD ¶ 79; *Chattanooga Office Supply Co.*, B-228062, Sept. 3, 1987, 87-2 CPD ¶ 221 (bid delivered 30 seconds after bid opening officer declared the arrival of the bid opening time is late).
  - b. The bid opening officer's declaration of the bid opening time is determinative unless it is shown to be unreasonable. *Action Serv. Corp.*, B-254861, Jan. 24, 1994, 94-1 CPD ¶ 33. The bid opening officer may reasonably rely on the bid opening room clock when declaring bid opening time. *General Eng'g Corp.*, B-245476, Jan. 9, 1992, 92-1 CPD ¶ 45.

- c. If the bid opening officer has not declared bid opening time, a bid is timely if delivered by the end of the minute specified for bid opening. *Amfel Constr., Inc.*, B-233493.2, May 18, 1989, 89-1 CPD ¶ 477 (bid delivered within 20-50 seconds after bid opening clock “clicked” to the bid opening time was timely where bid opening officer had not declared bid submission period ended); *Reliable Builders, Inc.*, B-249908.2, Feb. 9, 1993, 93-1 CPD ¶ 116 (bid which was time/date stamped one minute past time set for bid opening was timely since bidder relinquished control of bid at the exact time set for bid opening).
  - d. Arbitrary early or late bid opening is improper. *William F. Wilke, Inc.*, B-185544, Mar. 18, 1977, 77-1 CPD ¶ 197.
4. Amendment of IFB.
- a. The government must display amendments in the bid room and must send, before the time for bid opening, a copy of the amendment to everyone that received a copy of the original IFB. FAR 14.208(a).
  - b. If the government furnishes information to one prospective bidder concerning an invitation for bids, it must furnish that same information to all other bidders as an amendment if (1) such information is necessary for bidders to submit bids or (2) the lack of such information would be prejudicial to uninformed bidders. FAR 12.208(c). *See Phillip Sitz Constr.*, B-245941, Jan. 22, 1992, 92-1 CPD ¶ 101; *see also Republic Flooring*, B-242962, June 18, 1991, 91-1 CPD ¶ 579 (bidder excluded from BML erroneously).
5. Postponement of bid opening. FAR 14.208; FAR 14.402-3.
- a. The government may postpone bid opening before the scheduled bid opening time by issuing an amendment to the IFB. FAR 14.208(a).

- b. The government may postpone bid opening even **after** the time scheduled for bid opening if:
  - (1) The contracting officer has reason to believe that the bids of an important segment of bidders have been delayed in the mails for causes beyond their control and without their fault or negligence, *Ling Dynamic Sys., Inc.*, B-252091, May 24, 1993, 93-1 CPD ¶ 407; or
  - (2) Emergency or unanticipated events interrupt normal governmental processes so that the conduct of bid opening as scheduled is impractical. If urgent requirements preclude amendment of the solicitation:
    - (a) the time for bid opening is deemed extended until the same time of day on the first normal work day; and
    - (b) the time of actual bid opening is the cutoff time for determining late bids. FAR 14.402-3 (c). *See ALM, Inc.*, B-225679, Feb. 13, 1987, 87-1 CPD ¶ 165, but note that this case pre-dates the applicable FAR provision.
- c. For postponement due to the delay of an important segment of bids in the mails, the contracting officer publicly must announce postponement of bid opening and issue an amendment.

D. The Firm Bid Rule.

- 1. Distinguish common law rule, which allows an offeror to withdraw an offer any time prior to acceptance. *See Restatement (Second) of Contracts* § 42 (1981).

2. Firm Bid Rule:

- a. After bid opening, bidders may not withdraw their bids during the period specified in the IFB, but must hold their bids open for government acceptance during the stated period. FAR 14.201-6(j) & 52.214-16.
- b. If the solicitation requires a minimum bid acceptance period, a bid that offers a shorter acceptance period than the minimum is nonresponsive. *See Banknote Corp. of America, Inc.*, B-278514, 1998 U.S. Comp. Gen. LEXIS 33 (Feb. 4, 1998) (bidder offered 60-day bid acceptance period when solicitation required 180 days and advised bidders to disregard 60-day bid acceptance period provision); *see also Hyman Brickle & Son, Inc.*, B-245646, Sept. 20, 1991, 91-2 CPD ¶ 264 (30-day acceptance period offered instead of the required 120 days).
- c. The bid acceptance period is a material solicitation requirement. The government may not waive the bid acceptance period because it affects the bidder's price. *Valley Constr. Co.*, B-243811, Aug. 7, 1991, 91-2 CPD ¶ 138 (60 day period required, 30-day period offered).
- d. A bid that fails to offer an unequivocal minimum bid acceptance period is ambiguous and nonresponsive. *See John P. Ingram Jr. & Assoc.*, B-250548, Feb. 9, 1993, 93-1 CPD ¶ 117 (bid ambiguous even where bidder acknowledged amendment which changed minimum bid acceptance period). *But see Connecticut Laminating Company, Inc.*, B-274949.2, Dec. 13, 1999, 99-2 CPD ¶ 108 (bid without bid acceptance period is acceptable where solicitation did not require any minimum bid acceptance period).
- e. Exception - the government may accept a solitary bid that offers less than the minimum acceptance period. *Professional Materials Handling Co.*, - - *Reconsideration*, 61 Comp. Gen. 423 (1982).

- f. After the bid acceptance period expires, the bidder may extend the acceptance period only where the bidder would not obtain an advantage over other bidders. FAR 14-404-1(d). *See Capital Hill Reporting, Inc.*, B-254011.4, Mar. 17, 1994, 94-1 CPD ¶ 232. *See also NECCO, Inc.*, B-258131, Nov. 30, 1994, 94-2 CPD ¶ 218 (bidder ineligible for award where bid expired due to bidder's offering a shorter extension period than requested by the agency).

E. Treatment of Late Bids, Bid Modifications, and Bid Withdrawals. FAR 14.304. "The Late Bid Rule."

1. Definition: A "late" bid, bid modification, or bid withdrawal is one that is received in the office **designated** in the IFB after the **exact time** set for bid opening. FAR 14.304(b)(1). If the IFB does not specify a time, the time for receipt is 4:30 P.M., local time for the designated government office. *Id.*
2. There are exceptions to the **late bid rule**. These exceptions, listed in paragraph F. below, only apply if the contracting officer receives the late bid **prior to contract award**. FAR 14.304(b)(1).
3. General rule for all bids, bid modifications, and bid withdrawals:

⇒ **LATE IS LATE!** FAR 14.304(b)(1); FAR 52.214-7; *The Staubach Co.*, B-276486, May 19, 1997, 97-1 CPD ¶ 190 (citing *Carter Mach. Co.*, B-245008, Aug. 7, 1991, 91-2 CPD ¶ 143).

F. Exceptions to the Late Bid Rule.

1. **Electronically submitted bids.** A bid may be considered if it was transmitted through an electronic commerce method authorized by the solicitation and was received **at the initial point of entry to the government infrastructure** by the government not later than 5:00 P.M. one working day prior to the date specified for the receipt of bids. FAR 14.304(b)(1)(i).

2. **Government control.** A bid may be considered if there is acceptable evidence to establish that it was received at the government installation designated for receipt of bids and was under the Government's control prior to the time set for receipt of bids. FAR 14.304(b)(1)(ii). *J.L. Malone & Assocs.*, B-290282, July 2, 2002, (receipt of a bid by a contractor, at the direction of the contracting officer, satisfied receipt and control by the government).
3. The “**Government Frustration**” Rule.
  - a. If timely delivery of a bid, bid modification, or bid withdrawal that is hand-carried by the bidder (or commercial carrier) is frustrated by the government such that the government is the **paramount cause** of the late delivery, then the bid is timely. *Computer Literacy World, Inc.*, GSBCA 11767-P, May 22, 1992, 92-3 BCA ¶ 25,112 (government employee gave unwise instructions, which caused the delay); *Kelton Contracting, Inc.*, B-262255, Dec 12, 1995, 95-2 CPD ¶ 254 (Federal Express Package misdirected by agency).
  - b. Consideration of the bid would not compromise the integrity of the competitive procurement system. *See Richards Painting Co.*, B-232678, Jan. 25, 1989, 89-1 CPD ¶ 76 (late bid should be considered when bid **opening** room was in a different location than bid **receipt** room, protestor arrived at bid **receipt** location before the time set for bid opening, the room was locked, there was no sign directing bidder to the bid opening room and protestor arrived at bid opening room 3 minutes late). *See also, Palomar Grading & Paving, Inc.*, B-274885, Jan. 10, 1997, 97-1 CPD ¶ 16 (late bid should be considered where lateness was due to government misdirection and bid had been relinquished to UPS); *Select, Inc.*, B-245820.2, Jan. 3, 1992, 92-1 CPD ¶ 22 (bidder relinquished control of bid by giving it to UPS).
  - c. The government may consider commercial carrier records to establish time of delivery to the agency, if corroborated by relevant government evidence. *Power Connector, Inc.*, B-256362, June 15, 1994, 94-1 CPD ¶ 369 (agency properly considered Federal Express tracking sheet, agency mail log, and statements of agency personnel in determining time of receipt of bid).

- d. If the government is not the cause of the late delivery of the hand-carried bid, then the general rule applies—late is late. *Selrico Services, Inc.*, B-259709.2, May 1, 1995, 95-1 CPD ¶ 224 (erroneous confirmation by agency of receipt of bid); *but see Aable Tank Services, Inc.*, B-273010, Nov. 12, 1996, 96-2 CPD ¶ 180 (bid should be considered when its arrival at erroneous location was due to agency’s affirmative misdirection).
- e. The bidder must not have contributed substantially to the late receipt of the bid; it must act reasonably to fulfill its responsibility to deliver the bid to the proper place by the proper time. *Bergen Expo Sys., Inc.*, B-236970, Dec. 11, 1989, 89-2 CPD ¶ 540 (Federal Express courier refused access by guards, but courier departed); *Monthei Mechanical, Inc.*, B-216624, Dec. 17, 1984, 84-2 CPD ¶ 675 (bid box moved, but bidder arrived only 30 seconds before bid opening).
- f. **This rule has no statutory or regulatory basis; rather, the GAO fashioned the rule under its bid protest authority.**

G. Modifications and Withdrawals of Bids.

- 1. When may offerors modify their bids?
  - a. **Before** bid opening: Bidders may modify their bids at any time before bid opening. FAR 14.303; FAR 52.214-7.
  - b. **After** bid opening: Bidders may modify their bids only if one of the exceptions to the Late Bid Rule applies to the modification. FAR 14.304(b)(1); FAR 52.214-7(b).
    - (1) See FAR exceptions to Late Bid Rule in paragraph F. above.
    - (2) Government Frustration Rule. *I & E Constr. Co.*, B-186766, Aug. 9, 1976, 76-2 CPD ¶ 139.

- (3) The government may also accept a late modification to an otherwise successful bid if it is more favorable to the government. FAR 14.304(b)(2); FAR 52.214-7(b)(2); *Environmental Tectonics Corp.*, B-225474, Feb. 17, 1987, 87-1 CPD ¶ 175.

2. When may offerors withdraw their bids?

- a. **Before** bid opening: Bidders may withdraw their bids at any time before bid opening. FAR 14.303 and 14.304(e); FAR 52.214-7.
- b. **After** bid opening. Because of the Firm Bid Rule, bidders generally may withdraw their bids **only if** one of the exceptions to the Late Bid Rule applies. FAR 14.304(b)(1); FAR 52.214-7(b)(1). *See* Para. VII.G, *infra*.

3. Transmission of modifications or withdrawals of bids. FAR 14.303 and FAR 52.214-7(e).

- a. Offerors may modify or withdraw their bids by written or telegraphic notice, which must be received in the office designated in the invitation for bids before the exact time set for bid opening. FAR 14.303(a). *See R.F. Lusa & Sons Sheetmetal, Inc.*, B-281180.2, Dec. 29, 1998, 98-2 CPD ¶ 157 (unsigned/uninitialed inscription on outside envelope of bid not an effective bid modification).
- b. The exceptions to the late bid rule apply to bid modifications and bid withdrawals only if the modification or withdrawal is received **prior to contract award**, unless it is a modification of the successful offeror's bid. FAR 14.304(b)(1); FAR 14.304(b)(2).



## **VII. EVALUATION OF BIDS.**

### **A. Evaluation of Price.**

1. Contracting officer evaluates price and price-related factors. FAR 14.201-8.
2. Award made on basis of lowest price offered.
3. Evaluating Bids with Options. Evaluate bid prices by adding the total price of the options to the price of the basic requirement, unless such an evaluation is not in “the government’s best interests.” FAR 17.206; *Kruger Construction Inc.*, Comp. Gen. B-286960, Mar. 15, 2001, 2001 CPD ¶ 43 (not in the government’s best interests to add two option prices when options were alternative). *See also, TNT Industrial Contractors, Inc.*, B-288331, Sep. 25, 2001, 2001 CPD ¶ 155.
4. The government may reject a materially unbalanced bid. A materially unbalanced bid contains inflated prices for some contract line items and below-cost prices for other line items, and gives rise to a reasonable doubt that award will result in the lowest overall cost to the government. FAR 14.404-2(g); *LBCO, Inc.*, B-254995, Feb. 1, 1994, 94-1 CPD ¶ 57 (inflated first article prices).

B. Evaluation of Responsiveness of Bids. 10 U.S.C. § 2305; 41 U.S.C. § 253b.

1. A bid is responsive if it unequivocally offers to provide the requested supplies or services at a firm, fixed price. Unless something on the face of the bid either limits, reduces, or modifies the obligation to perform in accordance with the terms of the invitation, the bid is responsive. *Tel-Instrument Electronics Corp.* 56 Fed. Cl. 174, Apr. 8, 2003, (a bid conditioned on the use of equipment not included in the solicitation, requiring special payment terms, or limiting its warranty obligation modifies a material requirement and is nonresponsive); *New Shawmut Timber Co.*, Comp. Gen. B-286881, Feb. 26, 2001, 2001 CPD ¶ 42 (blank line item “rendered the bid equivocal regarding whether [protestor] intended to obligate itself to perform that element of the requirement.” Bid was nonresponsive.); *New Dimension Masonry, Inc.*, B-258876, Feb. 21, 1995, 95-1 CPD ¶ 102 (statements in cover letter conditioned the bid); *Metric Sys. Corp.*, B-256343, June 10, 1994, 94-1 CPD ¶ 360 (bidder’s exception to IFB indemnification requirements changed legal relationship between parties); *All Seasons Construction, Inc. v. United States*, 55 Fed. Cl. 175 (2003) (all documents accompanying a bid bond, including the power of attorney appointing the attorney-in-fact, must unequivocally establish, at bid opening, that the bond is enforceable against the surety).
2. The government may accept only a responsive bid. The government must reject any bid that fails to conform to the essential requirements of the IFB. FAR 14.301(a); FAR 14.404-2.
3. The government may not accept a nonresponsive bid even though it would result in monetary savings to the government since acceptance would compromise the integrity of the bidding system. *MIBO Constr. Co.*, B-224744, Dec. 17, 1986, 86-2 CPD ¶ 678.
4. When is responsiveness determined? The contracting officer determines the responsiveness of each bid at the **time of bid opening** by ascertaining whether the bid meets all of the IFB’s essential requirements. See *Gelco Payment Sys., Inc.*, B-234957, July 10, 1989, 89-2 CPD ¶ 27. See also *Stanger Indus. Inc.*, B-279380, June 4, 1998, 98-1 CPD ¶ 157 (agency improperly rejected low bid that used unamended bid schedule that had been corrected by amendment where bidder acknowledged amendments and bid itself committed bidder to perform in accordance with IFB requirements).

5. Essential requirements of responsiveness. FAR 14.301; FAR 14.404-2; FAR 14.405; *Tektronix, Inc.*; *Hewlett Packard Co.*, B-227800, Sep. 29, 1987, 87-2 CPD ¶ 315.
- a. **Price.** The bidder must offer a firm, fixed price. FAR 14.404-2(d); *United States Coast Guard*, B-252396, Mar. 31, 1993, 93-1 CPD ¶ 286 (bid nonresponsive where price included fee of \$1,000 per hour for “additional unscheduled testing” by government); *J & W Welding & Fabrication*, B-209430, Jan. 25, 1983, 83-1 CPD ¶ 92 (“plus 5% sales tax if applicable”—nonresponsive).
- b. **Quantity.** The bidder must offer the quantity required in the IFB. FAR 14.404-2(b). *Inscom Elec. Corp.*, B-225221, Feb. 4, 1987, 87-1 CPD ¶ 116 (bid limited government’s right to reduce quantity under the IFB); *Pluribus Prod., Inc.*, B-224435, Nov. 7, 1986, 86-2 CPD ¶ 536.
- c. **Quality.** The bidder must agree to meet the quality requirements of the IFB. FAR 14.404-2(b); *Wyoming Weavers, Inc.*, B-229669.3, June 2, 1988, 88-1 CPD ¶ 519.
- d. **Delivery.** The bidder must agree to the delivery schedule. FAR 14.404-2(c); *Valley Forge Flag Company, Inc.*, B-283130, Sept. 22, 1999, 99-2 CPD ¶ 54 (bid nonresponsive where bidder inserts delivery schedule in bid that differs from that requested in the IFB); *Viereck Co.*, B-256175, May 16, 1994, 94-1 CPD ¶ 310 (bid nonresponsive where bidder agreed to 60-day delivery date only if the cover page of the contract were faxed on the day of contract award). *But see Image Contracting*, B-253038, Aug. 11, 1993, 93-2 CPD ¶ 95 (bidder’s failure to designate which of two locations it intended to deliver did not render bid nonresponsive where IFB permitted delivery to either location).

6. Other bases for rejection of bids for being nonresponsive.
- a. Ambiguous, indefinite, or uncertain bids. FAR 14.404-2(d); *Trade-Winds Env'tl. Restoration, Inc.*, B-259091, Mar. 3, 1995, 95-1 CPD ¶ 127 (bid contained inconsistent prices); *Caldwell & Santmyer, Inc.*, B-260628, July 3, 1995, 95-2 CPD ¶ 1 (uncertainty as to identity of bidder); *Reid & Gary Strickland Co.*, B-239700, Sept. 17, 1990, 90-2 CPD ¶ 222 (notation in bid ambiguous).
  - b. Variation of acceptance period. *John's Janitorial Serv.*, B-219194, July 2, 1985, 85-2 CPD ¶ 20.
  - c. Placing a "confidential" stamp on bid. *Concept Automation, Inc. v. General Accounting Office*, GSBCA No. 11688-P, Mar. 31, 1992, 92-2 BCA ¶ 24,937. *But see North Am. Resource Recovery Corp.*, B-254485, Dec. 17, 1993, 93-2 CPD ¶ 327 ("proprietary data" notation on cover of bid did not restrict public disclosure of the bid where no pages of the bid were marked as proprietary).
  - d. Bid conditioned on receipt of local license. *National Ambulance Co.*, B-184439, Dec. 29, 1975, 55 Comp. Gen. 597, 75-2 CPD ¶ 413.
  - e. Requiring government to make progress payments. *Vertiflite, Inc.*, B-256366, May 12, 1994, 94-1 CPD ¶ 304.

- f. Failure to furnish required or adequate bid guarantee. *Interstate Rock Products, Inc. v. United States*, 50 Fed. Cl. 349 (2001) (COFC seconded a long line of GAO decisions holding that “the penal sum [of a bid bond] is a material term of the contract (the bid bond) and therefore its omission is a material defect rendering the bid nonresponsive); *Schrepfer Indus., Inc.*, B-286825, Feb. 12, 2001, 01 CPD ¶ 23 (photocopied power of attorney unacceptable); *Quantum Constr., Inc.*, B-255049, Dec. 1, 1993, 93-2 CPD ¶ 304 (defective power of attorney submitted with bid bond); *Kinetic Builders, Inc.*, B-223594, Sept. 24, 1986, 86-2 CPD ¶ 342 (bond referenced another solicitation number); *Clyde McHenry, Inc.*, B-224169, Sept. 25, 1986, 86-2 CPD ¶ 352 (surety’s obligation under bond unclear). *But see*, FAR 28.101-4(c) (setting forth nine exceptions to the FAR’s general requirement to reject bids with noncompliant bid guarantees) and *South Atlantic Constr. Co., LLC.*, Comp. Gen. B-286592.2, Apr. 13, 2001, 2001 CPD ¶ 63.
  
- g. Exception to liquidated damages. *Dubie-Clark Co.*, B-186918, Aug. 26, 1976, 76-2 CPD ¶ 194.
  
- h. Solicitation requires F.O.B. destination; bid states F.O.B. origin. *Taylor-Forge Eng’d Sys., Inc.*, B-236408, Nov. 3, 1989, 89-2 CPD ¶ 421.
  
- i. Failure to include sufficient descriptive literature (when required by IFB) to demonstrate offered product’s compliance with specifications. FAR 52.214-21; *Adrian Supply Co.*, B-250767, Feb. 12, 1993, 93-1 CPD ¶ 131. **NOTE:** The contracting officer generally should disregard **unsolicited** descriptive literature. However, if the unsolicited literature raises questions reasonably as to whether the offered product complies with a material requirement of the IFB, the bid should be rejected as nonresponsive. FAR 14.202-5(f); FAR 14.202-4(g); *Delta Chem. Corp.*, B-255543, Mar. 4, 1994, 94-1 CPD ¶ 175; *Amjay Chems.*, B-252502, May 28, 1993, 93-1 CPD ¶ 426.

C. Responsiveness Distinguished from Responsibility. *Data Express, Inc.*, B234685, July 11, 1989, 89-2 CPD ¶ 28.

1. Bid responsiveness concerns whether a bidder has offered **unequivocally** in its bid documents to provide supplies in conformity with all material terms and conditions of a solicitation for sealed bids, and it is determined as of the time of bid opening.
2. Responsibility refers to a bidder's apparent **ability** and **capacity** to perform, and it is determined any time prior to award. *Triton Marine Constr. Corp.*, B-255373, Oct. 20, 1993, 93-2 CPD ¶ 255 (bidder's failure to submit with its bid preaward information to determine the bidder's ability to perform the work solicited does not render bid nonresponsive). *Great Lakes Dredge & Dock Co.*, B-290158, June 17, 2002, 2002 CPD ¶ 100 (the terms of the solicitation cannot convert a matter of responsibility into one of responsiveness).
3. **The issue of responsiveness is relevant only to the sealed bidding method of contracting.**

D. Informalities or Irregularities in Bids. FAR 14.405.

1. Minor irregularities.
  - a. **Definition:** A minor informality or irregularity is merely a matter of form, not of substance. The defect or variation is immaterial when the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of supplies or services acquired. FAR 14.405.
  - b. To determine whether a defect or variation is immaterial, review the facts of the case with the following considerations:
    - (1) whether item is divisible from solicitation requirements;
    - (2) whether cost of item is *de minimis* as to contractor's total cost; and

- (3) whether waiver or correction clearly would not affect competitive standing of bidders.

c. Examples of minor irregularities.

- (1) Failure to return the number of copies of signed bids required by the IFB. FAR 14.405(a).
- (2) Failure to submit employer identification number. *Dyneteria, Inc.*, B-186823, Oct. 18, 1976, 76-2 CPD ¶ 338.
- (3) Use of abbreviated corporate name if the bid otherwise establishes the identity of the party to be bound by contract award. *Americorp*, B-232688, Nov. 23, 1988, 88-2 CPD ¶ 515 (bid also gave Federal Employee Identification Number).
- (4) Failure to certify as a small business on a small business set-aside. *See J. Morris & Assocs.*, B-259767, 95-1 CPD ¶ 213 (bidder may correct erroneous certification after bid opening).
- (5) Failure to initial bid correction. *Durden & Fulton, Inc.*, B-192203, Sept. 5, 1978, 78-2 CPD ¶ 172.
- (6) Failure to price individually each line item on a contract to be awarded on an “all or none” basis. *See Seaward Corp.*, B-237107.2, June 13, 1990, 90-1 CPD ¶ 552; *see also Vista Contracting, Inc.*, B-255267, Jan. 7, 1994, 94-1 CPD ¶ 61 (failure to indicate cumulative bid price).

- (7) Failure to furnish information with bid, if the information is not necessary to evaluate bid and bidder is bound to perform in accordance with the IFB. *W.M. Schlosser Co.*, B-258284, Dec. 12, 1994, 94-2 CPD ¶ 234 (equipment history); *But see Booth & Assocs., Inc. - - Advisory Opinion*, B-277477.2, Mar. 27, 1998, 98-1 CPD ¶104 (agency properly reinstated bid where bidder failed to include completed supplemental schedule of hourly rates but schedule was not used in the bid price evaluation).
  - (8) Negligible variation in quantity. *Alco Env'tl. Servs., Inc.*, ASBCA No. 43183, 94-1 BCA ¶ 26,261 (variation in IFB quantity of .27 percent).
  - (9) Failure to acknowledge amendment of the solicitation if the bid is clearly based on the IFB as amended, or the amendment is a matter of form or has a negligible impact on the cost of contract performance. *See FAR 14.405(d)*.
- d. Discretionary decision—the contracting officer shall give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency, whichever is to the government's advantage. FAR 14.405; *Excavation Constr. Inc. v. United States*, 494 F.2d 1289 (Ct. Cl. 1974).
2. Signature on bid.
- a. Normally, a bidder's failure to sign the bid is not a minor irregularity, and the government must reject the unsigned bid. *See Firth Constr. Co. v. United States*, 36 Fed. Cl. 268 (1996) (no signature on SF 1442); *Power Master Elec. Co.*, B-223995, Nov. 26, 1986, 86-2 CPD ¶ 615 (typewritten name); *Valencia Technical Serv., Inc.*, B-223288, July 7, 1986, 86-2 CPD ¶ 40 ("Blank" signature block); *but see PCI/RCI v. United States*, 36 Fed. Cl. 761 (1996) (one partner may bind a joint venture).



- b. **Exception.** If the bidder has manifested an intent to be bound by the bid, the failure to sign is a minor irregularity. FAR 14.405(c).

- (1) Adopted alternative. *A & E Indus.*, B-239846, May 31, 1990, 90-1 CPD ¶ 527 (bid signed with a rubber stamp signature must be accompanied by evidence authorizing use of the rubber stamp signature).
- (2) Other signed materials included in bid. *Johnny F. Smith Truck & Dragline Serv., Inc.*, B-252136, June 3, 1993, 93-1 CPD ¶ 427 (signed certificate of procurement integrity); *Tilley Constructors & Eng'rs, Inc.*, B-251335.2, Apr. 2, 1993, 93-1 CPD ¶ 289; *Cable Consultants, Inc.*, B-215138, 63 Comp. Gen. 521 (1984).

E. Failure to Acknowledge Amendment of Solicitations.

1. General rule: Failure to acknowledge a material amendment renders the bid nonresponsive. See *Christolow Fire Protection Sys.*, B-286585, Jan. 12, 2001, 01 CPD ¶ 13 (amendments “clarifying matters that could otherwise engender disputes during contract performance are generally material and must be acknowledged.” Amendment revising inaccurate information in bid schedule regarding number, types of, and response times applicable to service calls was material;); *Environmediation Svcs., LLC*, B-280643, Nov. 2, 1998, 98-2 CPD ¶ 103. See also *Logistics & Computer Consultants Inc.*, B-253949, Oct. 26, 1993, 93-2 CPD ¶ 250 (amendment placing additional obligations on contractor under a management contract); *Safe-T-Play, Inc.*, B-250682.2, Apr. 5, 1993, 93-1 CPD ¶ 292 (amendment classifying workers under Davis-Bacon Act).
2. Even if an amendment has no clear effect on the contract price, it is material if it changes the legal relationship of the parties. *Specialty Contractors, Inc.*, B-258451, Jan. 24, 1995, 95-1 CPD ¶ 38 (amendment changing color of roofing panels); *Anacomp, Inc.*, B-256788, July 27, 1994, 94-2 CPD ¶ 44 (amendment requiring contractor to pickup computer tapes on “next business day” when regular pickup day was a federal holiday); *Favino Mechanical Constr., Ltd.*, B-237511, Feb. 9, 1990, 90-1 CPD ¶ 174 (amendment incorporating Order of Precedence clause).

3. An amendment that is nonessential or trivial need not be acknowledged. FAR 14.405(d)(2); *Lumus Construction, Inc.*, B-287480, June 25, 2001, 2001 CPD ¶ 108 (Where an “amendment does not impose any legal obligations on the bidder different from those imposed by the original solicitation,” the amendment is not material); *Jackson Enters., Comp.* Gen. B-286688, Feb. 5, 2001, 2001 CPD ¶ 25; *L&R Rail Serv.*, B-256341, June 10, 1994, 94-1 CPD ¶ 356 (amendment decreasing cost of performance not material); *Day & Night Janitorial & Maid Serv., Inc.*, B-240881, Jan. 2, 1991, 91-1 CPD ¶ 1 (negligible effect on price, quantity, quality, or delivery).
4. How does a bidder acknowledge an amendment?
  - a. In writing only. Oral acknowledgement of an amendment is insufficient. *Alcon, Inc.*, B-228409, Feb. 5, 1988, 88-1 CPD ¶ 114.
  - b. Formal acknowledgement.
    - (1) Sign and return a copy of the amendment to the contracting officer.
    - (2) Standard Form 33, Block 14.
    - (3) Notify the government by letter or by telegram of receipt of the amendment.
  - c. Constructive acknowledgement. The contracting officer may accept a bid that clearly indicates that the bidder received the amendment. *C Constr. Co.*, B-228038, Dec. 2, 1987, 67 Comp. Gen. 107, 87-2 CPD ¶ 534.

F. Rejection of All Bids—Cancellation of the IFB.

1. **Prior** to bid opening, almost any reason will justify cancellation of an invitation for bids if the cancellation is “in the public interest.” FAR 14.209.

2. **After** bid opening, the government may not cancel an IFB unless there is a compelling reason to reject all bids and cancel the invitation. FAR 14.404-1(a)(1). *See Grot, Inc.*, B-276979.2, Aug. 14, 1997, 97-2 CPD ¶ 50 (cancellation proper where all bids exceeded the “awardable range” and agency concluded that specifications were unclear); *Site Support Servs, Inc.*, B-270229, Feb. 13, 1996, 96-1 CPD ¶ 74 (cancellation proper where IFB contained incorrect government estimate); *Canadian Commercial Corp./ Ballard Battery Sys. Corp.*, B-255642, Mar. 18, 1994, 94-1 CPD ¶ 202 (no compelling reason to cancel simply because some terms of IFB are somehow deficient); *US Rentals*, B-238090, Apr. 5, 1990, 90-1 CPD ¶ 367 (contracting officer cannot deliberately let bid acceptance period expire as a vehicle for cancellation); *C-Cubed Corp.*, B-289867, Apr. 26, 2002, 2002 CPD ¶ 72 (agency may cancel a solicitation after bid opening if the IFB fails to reflect the agency’s needs).
3. Examples of compelling reasons to cancel.
  - a. Violation of statute. *Sunrise International Group*, B-252892.3, Sep. 14, 1993, 93-2 CPD ¶ 160 (agency’s failure to allow 30 days in IFB for submission of bids in violation of CICA was compelling reason to cancel IFB).
  - b. Insufficient funds. *Michelle F. Evans*, B-259165, Mar. 6, 1995, 95-1 CPD ¶ 139 (management of funds is a matter of agency judgment); *Armed Forces Sports Officials, Inc.*, B-251409, Mar. 23, 1993, 93-1 CPD ¶ 261 (no requirement for agency to seek increase in funds).
  - c. Requirement disappeared. *Zwick Energy Research Org., Inc.*, B-237520.3, Jan. 25, 1991, 91-1 CPD ¶ 72 (specification required engines driven by gasoline; agency directive required diesel).

- d. Specifications are defective and fail to state the government's minimum needs, or unreasonably exclude potential bidders. *McGhee Constr., Inc.*, B-250073.3, May 13, 1993, 93-1 CPD ¶ 379; *Control Corp.; Control Data Sys., Inc.—Protest and Entitlement to Costs*, B-251224.2, May 3, 1993, 93-1 CPD ¶ 353; *Digitize, Inc.*, B-235206.3, Oct. 5, 1989, 90-1 CPD ¶ 403; *Chenga Management*, B-290598, Aug. 8, 2002, 02-1 CPD ¶ 143 (specifications that are impossible to perform provide a basis to cancel the IFB after bid opening).
  - e. Agency determines to perform the services in-house. *Mastery Learning Sys.*, B-258277.2, Jan. 27, 1995, 95-1 CPD ¶ 54.
  - f. Time delay of litigation. *P. Francini & Co. v. United States*, 2 Cl. Ct. 7 (1983).
  - g. All bids unreasonable in price. *California Shorthand Reporting*, B-250302.2, Mar. 4, 1993, 93-1 CPD ¶ 202.
  - h. Eliminate appearance of unfair competitive advantage. *P&C Constr.*, B-251793, Apr. 30, 1993, 93-1 CPD ¶ 361.
  - i. Failure to incorporate wage rate determination. *JC&N Maint., Inc.*, B-253876, Nov. 1, 1993, 93-2 CPD ¶ 253.
  - j. Failure to set aside a procurement for small businesses or small disadvantaged businesses when required. *Baker Support Servs., Inc.; Mgmt. Technical Servs., Inc.*, B-256192.3, Sept. 2, 1994, 95-1 CPD ¶ 75; *Ryon, Inc.*, B-256752.2, Oct. 27, 1994, 94-2 CPD ¶ 163.
- 4. Before canceling the IFB, the contracting officer must consider any prejudice to bidders. If cancellation will affect bidders' competitive standing, such prejudicial effect on competition may offset the compelling reason for cancellation. *Canadian Commercial Corp., supra.*
  - 5. If an agency relies on an improper basis to cancel a solicitation, the cancellation may be upheld if another proper basis for the cancellation exists. *Shields Enters. v. United States*, 28 Fed. Cl. 615 (1993).

6. Cancellation of the IFB may be post-award. *Control Corp.*, B-251224.2, May 3, 1993, 93-1 CPD ¶ 353.

G. Mistakes in Bids Asserted Before Award. FAR 14.407-1.

1. General rule. A bidder bears the consequences of a mistake in its bid unless the contracting officer has actual or constructive notice of the mistake prior to award. *Advanced Images, Inc.*, B-209438.2, May 10, 1983, 83-1 CPD ¶ 495.
2. After bid opening, the government may permit the bidder to remedy certain substantive mistakes affecting price and price-related factors by correction or withdrawal of the bid. For example, a clerical or arithmetical error normally is correctable or may be a basis for withdrawal. *United Digital Networks, Inc.*, B-222422, July 17, 1986, 86-2 CPD ¶ 79 (multiplication error); but see *Virginia Beach Air Conditioning Corp.*, B-237172, Jan. 19, 1990, 90-1 CPD ¶ 78 (bid susceptible to two interpretations—correction improper).
3. Mistakes in bid that are **NOT** correctable.
  - a. Errors in judgment. *R.P. Richards Constr. Co.*, B-274859.2, Jan. 22, 1997, 97-1 CPD ¶ 39 (bidder's misreading of a subcontractor quote and reliance on its own extremely low estimate for certain work were mistakes in judgement).
  - b. Omission of items from the bid. *McGhee Constr., Inc.*, B-255863, Apr. 13, 1994, 94-1 CPD ¶ 254. *But see Pacific Components, Inc.*, B-252585, June 21, 1993, 93-1 CPD ¶ 478 (bid correction permitted for mistake due to omissions from subcontractor quotation).
  - c. Nonresponsive bid. *Temp Air Co., Inc.*, B-279837, Jul. 2, 1998, 98-2 CPD ¶ 1 (bid could not be made responsive by post-bid opening explanation or correction).

4. Only the government and the bidder responsible for the alleged mistake have standing to raise the issue of a mistake. *Huber, Hunt & Nichols, Inc.*, B-271112, May 21, 1996, 96-1 CPD 246 (contractor's negligence in bid preparation does not preclude correction); *Reliable Trash Serv., Inc.*, B-258208, Dec. 20, 1994, 94-2 CPD ¶ 252.
5. Contracting Officer's responsibilities.
  - a. The contracting officer must examine each bid for mistakes. FAR 14.407-1; *Andy Elec. Co.—Recon.*, B-194610.2, Aug. 10, 1981, 81-2 CPD ¶ 111.
    - (1) Actual notice of mistake in a bid.
    - (2) Constructive notice of mistake in a bid, e.g., price disparity among bids or comparison with government estimate. *R.J. Sanders, Inc. v. United States*, 24 Cl. Ct. 288 (1991) (bid 32% below government estimate insufficient to place contracting officer on notice of mistake in bid); *Central Mechanical, Inc.*, B-206250, Dec. 20, 1982, 82-2 CPD ¶ 547 (allocation of price out of proportion to other bidders).
  - b. Bid verification. The contracting officer must seek verification of each bid that he has reason to believe contains a mistake. FAR 14.407-1 and 14.407-3(g).
    - (1) To ensure that the bidder is put on notice of the suspected mistake, the contracting officer must advise the bidder of all disclosable information that leads the contracting officer to believe that there is a mistake in the bid. *Liebherr Crane Corp.*, ASBCA No. 24707, 85-3 BCA ¶ 18,353, *aff'd* 810 F.2d 1153 (Fed. Cir. 1987) (procedure inadequate); *But see Foley Co.*, B-258659, Feb. 8, 1995, 95-1 CPD ¶ 58 (bidder should be allowed an opportunity to explain its bid); *DWS, Inc.*, ASBCA No. 29743, 93-1 BCA ¶ 25,404 (particular price need not be mentioned in bid verification notice).

- (2) Effect of bidder verification. Verification generally binds the contractor unless the discrepancy is so great that acceptance of the bid would be unfair to the submitter or to other bidders. *Trataros Constr., Inc.*, B-254600, Jan. 4, 1994, 94-1 CPD ¶ 1 (contracting officer properly rejected verified bid that was far out of line with other bids and the government estimate). *But see Foley Co.*, B-258659, Feb. 8, 1995, 95-1 CPD ¶ 58 (government improperly rejected low bid where there was no evidence of mistake); *Aztech Elec., Inc. and Rod's Elec., Inc.*, B-223630, Sept. 30, 1986, 86-2 CPD ¶ 368 (below-cost bid is a matter of business judgment, not an obvious error requiring rejection).
    - (3) Effect of inadequate verification. If the contracting officer fails to obtain adequate verification of a bid for which the government has actual or constructive notice of a mistake, the contractor may seek additional compensation or rescission of the contract. *See, e.g., Solar Foam Insulation*, ASBCA No. 46921, 94-2 BCA ¶ 26,901.
  - c. The contracting officer may not award a contract to a bidder when the contracting officer has actual or constructive notice of a mistake in the bid, unless the mistake is waived or the bid is properly corrected in accordance with agency procedures. *Sealtite Corp.*, ASBCA No. 25805, 83-1 BCA ¶ 16,243.
6. Correction of mistakes prior to award—standard of proof and allowable evidence. FAR 14.407-3.
- a. The bidder alleging the mistake has the burden of proof. *VA—Advance Decision*, B-225815.2, Oct. 15, 1987, 87-2 CPD ¶ 362.

- b. Apparent clerical mistakes. FAR 14.407-2; *Brazos Roofing, Inc.*, B-275319, Feb. 7, 1997, 97-1 CPD ¶ 66 (incorrect entry of base price used in calculation of option year prices was an obvious transcription error); *Action Serv. Corp.*, B-254861, Jan. 24, 1994, 94-1 CPD ¶ 33 (additional zero); *Sovran Constr. Co.*, B-242104, Mar. 18, 1991, 91-1 CPD ¶ 295 (cumulative pricing); *Engle Acoustic & Tile, Inc.*, B-190467, Jan. 27, 1978, 78-1 CPD ¶ 72 (misplaced decimal point); *Dependable Janitorial Serv. & Supply Co.*, B-188812, July 13, 1977, 77-2 CPD ¶ 20 (discrepancy between unit and total prices); *B&P Printing, Inc.*, B-188511, June 2, 1977, 77-1 CPD ¶ 387 (comma rather than period—correct bid not approved).
  - (1) Contracting officer may correct, before award, any clerical mistake apparent on the face of the bid.
  - (2) The contracting officer must first obtain verification of the bid from the bidder.
- c. Other mistakes disclosed before award. FAR 14.407-3.
  - (1) Correction by low bidder. *Circle, Inc.*, B-279896, July 29, 1998, 98-2 CPD ¶ 67. *Shoemaker & Alexander, Inc.*, B-241066, Jan. 15, 1991, 91-1 CPD ¶ 41.
    - (a) The low bidder must show by clear and convincing evidence: (i) the existence of a mistake in its bid; and (ii) the bid actually intended or that the intended bid would fall within a narrow range of uncertainty and remain low. FAR 14.407-3. *See Three O Constr., S.E.*, B-255749, Mar. 28, 1994, 94-1 CPD ¶ 216 (no clear and convincing evidence where bidder gave conflicting explanations for mistake). *Will H. Hall and Son, Inc. v. United States*, 54 Fed. Cl. 436 (2002), (a contractor's 'careless' reliance on a subcontractor's quote that excluded a price for a portion of the work solicited is a correctable mistake).



- (b) Bidder can refer to such things as: (i) bidder's file copy of the bid; (ii) original work papers; (iii) a subcontractor's or supplier's quotes; or (iv) published price lists.
- (2) Correction of a bid that **displaces a lower bidder**. *J & J Maint., Inc.*, B-251355, Mar. 1, 1993, 93-1 CPD ¶ 187; *Virginia Beach Air Conditioning Corp.*, B-237172, Jan. 19, 1990, 90-1 CPD ¶ 78; *Eagle Elec.*, B-228500, Feb. 5, 1988, 88-1 CPD ¶ 116.
  - (a) Bidder must show by clear and convincing evidence: (a) the existence of a mistake; and (b) the bid actually intended. FAR 14.407-3.
  - (b) **Limitation on proof** - the bidder can prove a mistake only from the solicitation (IFB) and the bid submitted, not from any other sources. *Bay Pacific Pipelines, Inc.*, B-265659, Dec. 18, 1995, 95-2 CPD ¶ 272.
- d. Action permitted when a bidder presents clear and convincing evidence of a mistake, but not as to the bid intended; or evidence that reasonably supports the existence of a mistake, but is not clear and convincing. *Advanced Images, Inc.*, B-209438.2, May 10, 1983, 83-1 CPD ¶ 495.
  - (1) The bidder may withdraw the bid. FAR 14.407-3(c).
  - (2) The bidder may correct the bid where it is clear the intended bid would fall within a narrow range of uncertainty and remain the low bid. *Conner Bros. Constr. Co.*, B-228232.2, Feb. 3, 1988, 88-1 CPD ¶ 103; *Department of the Interior—Mistake in Bid Claim*, B-222681, July 23, 1986, 86-2 CPD ¶ 98.

- (3) The bidder may waive the bid mistake if it is clear that the intended bid would remain low. *William G. Tadlock Constr.*, B-251996, May 13, 1993, 93-1 CPD ¶ 382 (waiver not permitted); *Hercules Demolition Corp. of Virginia*, B-223583, Sep. 12, 1986, 86-2 CPD ¶ 292; *LABCO Constr., Inc.*, B-219437, Aug. 28, 1985, 85-2 CPD ¶ 240.
- e. Once a bidder asserts a mistake, the agency head or designee may disallow withdrawal or correction of the bid if the bidder fails to prove the mistake. FAR 14.407-3(d); *Duro Paper Bag Mfg. Co.*, B-217227, Jan. 3, 1986, 65 Comp. Gen. 186, 86-1 CPD ¶ 6.
  - f. Approval levels for corrections or withdrawals of bids.
    - (1) Apparent clerical errors: The contracting officer. FAR 14.407-2.
    - (2) Withdrawal of a bid on clear and convincing evidence of a mistake, but not of the intended bid: An official above the contracting officer. FAR 14.407-3(c).
    - (3) Correction of a bid on clear and convincing evidence both of the mistake and of the bid intended: The agency head or designee. FAR 14.407-3(a). **Caveat:** If correction would displace a lower bid, the government shall not permit the correction unless the mistake and the intended bid are both ascertainable substantially from the IFB and the bid submitted.
    - (4) Withdrawal rather than correction of a low bidder's bid: If (a) a bidder requests permission to withdraw a bid rather than correct it, (b) the evidence is clear and convincing both as to the mistake in the bid and the bid intended, and (c) the bid, both as uncorrected and as corrected, is the lowest received, the agency head or designee may determine to correct the bid and not permit its withdrawal. FAR 14.407-3(b).

- (5) Neither correction nor withdrawal. If the evidence does not warrant correction or withdrawal, the agency head may refuse to permit either withdrawal or correction. FAR 14.407-3(d).
- (6) Heads of agencies may delegate their authority to correct or permit withdrawal of bids without power of redelegation. FAR 14.407-3(e). This authority has been delegated to specified authorities within Defense Departments and Agencies.

## VIII. AWARD OF THE CONTRACT.

- A. Evaluation of the Responsibility of the Successful Bidder. 10 U.S.C. § 2305; 41 U.S.C. § 253b.
  - 1. Government acquisition policy requires that the contracting officer make an affirmative determination of responsibility prior to award. FAR 9.103.
  - 2. General rule. The contracting officer may award only to a responsible bidder. FAR 9.103(a); *Theodor Arndt GmbH & Co.*, B-237180, Jan. 17, 1990, 90-1 CPD ¶ 64 (responsibility requirement implied); *Atlantic Maint., Inc.*, B-239621.2, June 1, 1990, 90-1 CPD ¶ 523 (an unreasonably low price may render bidder nonresponsible); *but see The Galveston Aviation Weather P'ship*, B-252014.2, May 5, 1993, 93-1 CPD ¶ 370 (below-cost bid not legally objectionable, even when offering labor rates lower than those required by the Service Contract Act).
  - 3. Responsibility defined. Responsibility refers to an offeror's apparent **ability** and **capacity** to perform. To be responsible, a prospective contractor must meet the standards of responsibility set forth at FAR 9.104. FAR 9.101; *Kings Point Indus.*, B-223824, Oct. 29, 1986, 86-2 CPD ¶ 488.

4. Responsibility is determined at any time prior to award. Therefore, the bidder may provide responsibility information to the contracting officer at any time before award. FAR 9.103; FAR 9.105-1; *ADC Ltd.*, B-254495, Dec. 23, 1993, 93-2 CPD ¶ 337 (bidder's failure to submit security clearance documentation with its bid is not a basis for rejection of bid); *Cam Indus.*, B-230597, May 6, 1988, 88-1 CPD ¶ 443.

B. Minimum Standards of Responsibility—Contractor Qualification Standards.

1. General standards of responsibility. FAR 9.104-1.

- a. Financial resources. The contractor must demonstrate that it has adequate financial resources to perform the contract or that it has the ability to obtain such resources. FAR 9.104-1(a); *Excavators, Inc.*, B-232066, Nov. 1, 1988, 88-2 CPD ¶ 421 (a contractor is nonresponsible if it cannot or does not provide acceptable individual sureties).

- (1) Bankruptcy. Nonresponsibility determinations based solely on a bankruptcy petition violate 11 U.S.C. § 525. This statute prohibits a governmental unit from denying, revoking, suspending, or refusing to renew a license, permit, charter, franchise, or other similar grant to, or deny employment to, terminate employment of, or discriminate with respect to employment against, a person that is or has been a debtor under 11 U.S.C. § 525, solely because such person has been a debtor under that title. *Bender Shipbuilding & Repair Co. v. United States*, 297 F.3d 1358 (Fed. Cir. 2002), (upholding contracting officer's determination that awardee was responsible even though awardee filed for Chapter 11 Bankruptcy reorganization); *Global Crossing Telecomm., Inc.*, B-288413.6, B-288413.10, June 17, 2002, 2002 CPD ¶ 102 (upholding contracting officer's determination that a prospective contractor who filed for Chapter 11 was not responsible).
- (2) The courts have applied the bankruptcy anti-discrimination provisions to government determinations of eligibility for award. *In re Son-Shine Grading*, 27 Bankr. 693 (Bankr. E.D.N.C. 1983); *In re Coleman Am. Moving Serv., Inc.*, 8 Bankr. 379 (Bankr. D. Kan. 1980).

- (3) A determination of responsibility should not be negative **solely** because of a prospective contractor's bankruptcy. The contracting officer should focus on the contractor's ability to perform the contract, and justify a nonresponsibility determination of a bankrupt contractor accordingly. *Harvard Interiors Mfg. Co.*, B-247400, May 1, 1992, 92-1 CPD ¶ 413 (Chapter 11 firm found nonresponsible based on lack of financial ability); *Sam Gonzales, Inc.—Recon.*, B-225542.2, Mar. 18, 1987, 87-1 CPD ¶ 306.
- b. Delivery or performance schedule: The contractor must establish its ability to comply with the delivery or performance schedule. FAR 9.104-1(b); *System Dev. Corp.*, B-212624, Dec. 5, 1983, 83-2 CPD ¶ 644.
- c. Performance record: The contractor must have a satisfactory performance record. FAR 9.104-1(c). *Information Resources, Inc.*, B-271767, July 24, 1996, 96-2 CPD ¶ 38; *Saft America*, B-270111, Feb. 7, 1996, 96-1 CPD ¶ 134; *North American Constr. Corp.*, B-270085, Feb. 6, 1996, 96-1 CPD ¶ 44; *Mine Safety Appliances, Co.*, B-266025, Jan. 17, 1996, 96-1 CPD ¶ 86. The contracting officer **shall presume** that a contractor seriously deficient in recent contract performance is nonresponsible. FAR 9.104-3(b). *See Schenker Panamericana (Panama) S.A.*, B-253029, Aug. 2, 1993, 93-2 CPD ¶ 67 (agency justified in nonresponsibility determination where moving contractor had previously failed to conduct pre-move surveys, failed to provide adequate packing materials, failed to keep appointments or complete work on time, dumped household goods into large containers, stacked unprotected furniture onto trucks, dragged unprotected furniture through hallways, and wrapped fragile goods in a single sheet of paper; termination for default on prior contract not required). *See also Pacific Photocopy & Research Servs.*, B-281127, Dec. 29, 1998, 98-2 CPD ¶ 164 (contracting officer properly determined that bidder had inadequate performance record on similar work based upon consistently high volume of unresolved customer complaints).

- d. Management/technical capability: The contractor must display adequate management and technical capability to perform the contract satisfactorily. FAR 9.104-1(e); *TAAS-Israel Indus.*, B-251789.3, Jan. 14, 1994, 94-1 CPD ¶ 197 (contractor lacked design skills and knowledge to produce advanced missile launcher power supply).
  - e. Equipment/facilities/production capacity: The contractor must maintain or have access to sufficient equipment, facilities, and production capacity to accomplish the work required by the contract. FAR 9.104-1(f); *IPI Graphics*, B-286830, B-286838, Jan. 9, 2001, 01 CPD ¶ 12 (contractor lacked adequate production controls and quality assurance methods).
  - f. Business ethics: The contractor must have a satisfactory record of business ethics. FAR 9.104-1(d); FAR 9.407-2; FAR 14.404-2(h); *Interstate Equip. Sales*, B-225701, Apr. 20, 1987, 87-1 CPD ¶ 427.
2. Special or definitive standards of responsibility: Definitive responsibility criteria are specific, objective standards established by an agency to measure an offeror's ability to perform a given contract. FAR 9.104-2(a); *D.H. Kim Enters.*, B-255124, Feb. 8, 1994, 94-1 CPD ¶ 86.
- a. An example is to require that a prospective contractor have a specified number of years of experience performing the same or similar work. *Hardie-Tynes Mfg. Co.*, B-237938, Apr. 2, 1990, 90-1 CPD ¶ 587 (agency properly considered manufacturing experience of parent corporation in finding bidder met the definitive responsibility criterion of five years manufacturing experience); *BBC Brown Boveri, Inc.*, B-227903, Sept. 28, 1987, 87-2 CPD ¶ 309 (IFB required five years of experience in transformer design, manufacture, and service - GAO held that this definitive responsibility criterion was satisfied by a subcontractor).
  - b. Although the GAO will not readily review affirmative responsibility determinations based on general responsibility criteria, it will review affirmative responsibility determinations where the solicitation contains definitive responsibility requirements. 4 C.F.R. § 21.5(c) (1995).

- c. Evaluations using definitive responsibility criteria are subject to review by the Small Business Administration (SBA) through its Certificate of Competency process. FAR 19.602-4.
- d. Statutory/Regulatory Compliance.
  - (1) Licenses and permits.
    - (a) When a solicitation contains a **general** condition that the contractor comply with state and local licensing requirements, the contracting officer need not inquire into what those requirements may be or whether the bidder will comply. *James C. Bateman Petroleum Serv., Inc.*, B-232325, Aug. 22, 1988, 88-2 CPD ¶ 170; *but see Int'l Serv. Assocs.*, B-253050, Aug. 4, 1993, 93-2 CPD ¶ 82 (where agency determines that small business will not meet licensing requirement, referral to SBA required).
    - (b) On the other hand, when a solicitation requires **specific** compliance with regulations and licensing requirements, the contracting officer may inquire into the offeror's ability to comply with the regulations in determining the offeror's responsibility. *Intera Techs., Inc.*, B-228467, Feb. 3, 1988, 88-1 CPD ¶ 104.
  - (2) Statutory certification requirements.
    - (a) Small business concerns. The contractor must certify its status as a small business to be eligible for award as a small business. FAR 19.301.

- (b) Equal opportunity compliance. Contractors must certify that they will comply with “equal opportunity” statutory requirements. In addition, contracting officers must obtain pre-award clearances from the Department of Labor for equal opportunity compliance before awarding any contract (excluding construction) exceeding \$10 million. FAR Subpart 22.8. Solicitations may require the contractor to develop and file an affirmative action plan. FAR 52.222-22 and FAR 52.222-25; *Westinghouse Elec. Corp.*, B-228140, Jan. 6, 1988, 88-1 CPD ¶ 6.
  - (c) Submission of lobby certification. *Tennier Indus.*, B-239025, July 16, 1990, 90-2 CPD ¶ 25.
- (3) Organizational conflicts of interest. FAR Subpart 9.5. Government policy precludes award of a contract, without some restriction on future activities, if the contractor would have an actual or potential unfair competitive advantage, or if the contractor would be biased in making judgments in performance of the work. Necessary restrictions on future activities of a contractor are incorporated in the contract in one or more organizational conflict of interest clauses. FAR 9.502(c); *The Analytic Sciences Corp.*, B-218074, Apr. 23, 1985, 85-1 CPD ¶ 464.

C. Responsibility Determination Procedures.

- 1. Sources of information. The contracting officer must obtain sufficient information to determine responsibility. FAR 9.105.
  - a. Contracting officers may use pre-award surveys. FAR 9.105-1(b); FAR 9.106; DFARS 209.106; *Accurate Indus.*, B-232962, Jan. 23, 1989, 89-1 CPD ¶ 56.



- b. Contracting officer must check the list entitled *Parties Excluded from Procurement Programs*. FAR 9.105-1(c)(1); *see also* AFARS 9.4 and FAR Subpart 9.4. *But see R.J. Crowley, Inc.*, B-253783, Oct. 22, 1993, 93-2 CPD ¶ 257 (agency improperly relied on non-current list of ineligible contractors as basis for rejecting bid; agency should have consulted electronic update).
- c. Contracting and audit agency records and data pertaining to a contractor's prior contracts are valuable sources of information. FAR 9.105-1(c)(2).
- d. Contracting officers also may use contractor-furnished information. FAR 9.105-1(c)(3). *Int'l Shipbuilding, Inc.*, B-257071.2, Dec. 16, 1994, 94-2 CPD ¶ 245 (agency need not delay award indefinitely until the offeror cures the causes of its nonresponsibility).

- 2. Standards of review of contracting officer determinations of responsibility.

- a. Prior to 1 January 2003, GAO would not review **affirmative** responsibility determinations absent a showing of bad faith or fraud. 4 CFR § 21.5(c) (1995); *See Hard Bottom Inflatables, Inc.*, B-245961.2, Jan. 22, 1992, 92-1 CPD ¶ 103. The GAO amended its Bid Protest Regulations and now will consider a protest challenging that the definitive responsibility criteria in the solicitation were not met and those that identify evidence raising serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation. 67 Fed. Reg. 79,833 (Dec. 31, 2002). *See Impresa Costruzioni Geom. Domenico Garufi*, 52 Fed. Cl. 421 (2002) (finding the contracting officer failed to conduct an independent and informed responsibility determination).
  - b. The GAO will review nonresponsibility determinations for reasonableness. *Schwender/Riteway Joint Venture*, B-250865.2, Mar. 4, 1993, 93-1 CPD ¶ 203 (determination of nonresponsibility unreasonable when based on inaccurate or incomplete information).
- 3. Subcontractor responsibility issues.
  - a. The agency may review subcontractor responsibility. FAR 9.104-4(a).
  - b. Subcontractor responsibility is determined in the same fashion as is the responsibility of the prime contractor. FAR 9.104-4(b).

D. Award of the Contract.

- 1. Statutory standard. The contracting officer shall award with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous, considering price and other price-related factors. 10 U.S.C. § 2305(b)(4)(B); 41 U.S.C. § 253b; FAR 14.408-1(a).

2. Multiple awards. If the IFB does not prohibit partial bids, the government must make multiple awards when they will result in the lowest cost to the government. ; FAR 52.214-22; *WeatherExperts, Inc.*, B-255103, Feb. 9, 1994, 94-1 CPD ¶ 93.
3. An agency may not award a contract to an entity other than that which submitted a bid. *Gravelly & Rodriguez*, B-256506, Mar. 28, 1994, 94-1 CPD ¶ 234 (sole proprietorship submitted bid, partnership sought award).
4. Communication of acceptance of the offer and award of the contract. The contracting officer makes award by giving written notice within the specified time for acceptance. FAR 14.408-1(a).
5. The “mail box” rule applies to award of federal contracts. Award is effective upon mailing (or otherwise furnishing the award document) to the successful offeror. FAR 14.408-1(c)(1). *Singleton Contracting Corp.*, IBCA 1770-1-84, 86-2 BCA ¶ 18,800 (notice of award and request to withdraw bid mailed on same day); *Kleen-Rite Corp.*, B-190160, July 3, 1978, 78-2 CPD ¶ 2.

E. Mistakes in Bids Asserted After Award. FAR 14.407-4; FAR Subpart 33.2 (Disputes and Appeals).

1. The contracting officer may correct a mistake by contract modification if correction would be favorable to the government and would not change the essential requirements of the specifications.
2. The government may:
  - a. Rescind the contract;
  - b. Reform the contract;
    - (1) to delete items involved in the mistake; or

- (2) to increase the contract price if the price as increased does not exceed that of the next lowest acceptable bid; or
  - c. Make no change in the contract, if the evidence does not warrant rescission or reformation.
3. Rescission or reformation may be made only on the basis of clear and convincing evidence that a mistake in bid was made, and only if the mistake was (i) mutual or (ii) if unilaterally made by the contractor, was so apparent that the contracting officer should be charged with having had notice of the mistake. *Government Micro Resources, Inc. v. Department of Treasury*, GSBCA No. 12364-TD, 94-2 BCA ¶ 26,680 (government on constructive notice of mistake where contractor's price exceeded government estimate by 62% and comparison quote by 33%); *Kitco, Inc.*, ASBCA No. 45347, 93-3 BCA ¶ 26,153 (mistake must be clear cut clerical or arithmetical error, or misreading of specifications, not mistake of judgment); *Liebherr Crane Corp.*, 810 F.2d 1153 (Fed. Cir. 1987) (no relief for unilateral errors in business judgment).
  4. Reformation is not available for contract formation mistakes. *Gould, Inc. v. United States*, 19 Cl. Ct. 257 (1990).
    - a. Reformation is a form of equitable relief that applies to mistakes made in reducing the parties' intentions to writing, but not to mistakes that the parties made in forming the agreement. To show entitlement to reformation, the contractor must prove (i) a clear agreement between the parties and (ii) an error in reducing the agreement to writing.
    - b. The contractor must prove four elements in a claim for reformation based on mutual mistake. *Management & Training Corp. v. General Servs. Admin.*, GSBCA No. 11182, 93-2 BCA ¶ 25,814. These elements are:
      - (1) The parties to the contract were mistaken in their belief regarding a fact. *See Dairyland Power Co-op v. United States*, 16 F.3d 1197 (1994) (mistake must relate to an existing fact, not future events);
      - (2) The mistake involved a basic assumption of the contract;

- (3) The mistake affected contract performance materially; and
  - (4) The party seeking reformation did not agree to bear the risk of a mistake.
- 5. Proof requirements. Mistakes alleged or disclosed after award are processed in accordance with FAR 14.407-4(e) and FAR Subpart 33.2. The contracting officer shall request the contractor to support the alleged mistake by submission of written statements and pertinent evidence. *See Gov't Micro Resources, Inc. v. Department of Treasury*, supra (board awards contractor recovery on quantum valebant basis).
- 6. Mistakes alleged after award are subject to the Contract Disputes Act of 1978 and the Disputes and Appeals provisions of the FAR. FAR Subpart 33.2; *ABJ Servs.*, B-254155, July 23, 1993, 93-2 CPD ¶ 53 (the GAO will not review a mistake in bid claim alleged by the contractor after award).
- 7. Extraordinary contractual relief under Public Law No. 85-804. National Defense Contracts Act, 72 Stat. 972, 50 U.S.C. § 1431-1435; DFARS Subpart 250.

## **IX. CONCLUSION.**

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## **CHAPTER 7**

### **NEGOTIATIONS**

#### **I. INTRODUCTION.**

A. Objectives. Following this instruction, students will understand:

1. The extensive planning required to conduct a competitively negotiated procurement.
2. The procedures used to conduct a competitively negotiated procurement.
3. Some of the common problem areas to avoid in the award of a competitively negotiated procurement.

B. Background.

1. In the past, negotiated procurements were known as “open market purchases.” These procurements were authorized only in emergencies.
2. The Army Air Corps began using negotiated procurements in the 1930s to develop and acquire aircraft.
3. Negotiated procurements became universal during World War II. The Armed Services Procurement Act of 1947 authorized negotiated procurements for peacetime use if one of seventeen exceptions to formal advertising (now sealed bidding) applied.
4. In 1962, Congress codified agency regulations that required contractors to submit cost/pricing data for certain procurements to aid in the negotiation process.

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5. The Competition in Contracting Act (CICA) of 1984 expanded the use of negotiated procurements by eliminating the traditional preference for formal advertising (now sealed bidding).
6. In the early 1990s, Congress: (a) modified the procedures for awarding contracts on initial proposals; (b) expanded debriefings; and (c) made other minor procedural changes in the negotiated procurement process.
7. In 1997, the FAR Part 15 rewrite effort resulted in significant changes to the rules regarding: (a) exchanges with industry; (b) the permissible scope of discussions; and (c) the competitive range determination.

## **II. CHOOSING NEGOTIATIONS.**

- A. Sealed Bidding or Competitive Negotiations. The CICA eliminated the historical preference for formal advertising (now sealed bidding). Statutory criteria now determine which procedures to use.
- B. Criteria for Selecting Competitive Negotiations. 10 U.S.C. § 2304(a)(2) and 41 U.S.C. § 253(a)(2). The CICA provides that, in determining the appropriate competitive procedure, agencies:
  1. Shall solicit sealed bids if:
    - a. Time permits the solicitation, submission, and evaluation of sealed bids;
    - b. The award will be made solely on the basis of price and other price-related factors;
    - c. It is unnecessary to conduct discussions with responding sources; and
    - d. There is a reasonable expectation of receiving more than one sealed bid.

2. Shall request competitive proposals if sealed bids are not appropriate under B.1, above.

C. Contracting Officer's Discretion.

1. The decision to negotiate involves a contracting officer's business judgment, which will not be upset unless it is unreasonable. The contracting officer, however, must demonstrate that one or more of the sealed bidding criteria is not present. Specialized Contract Serv., Inc., B-257321, Sept. 2, 1994, 94-2 CPD ¶ 90 (finding that the Army reasonably concluded that it needed to evaluate more than price in procuring lodging services). Compare Racal Corp., B-240579, Dec. 4, 1990, 70 Comp. Gen. 127, 90-2 CPD ¶ 453 (finding that the possible need to hold discussions to assess offerors' understanding did not justify the use of negotiated procedures where the Army did not require offerors to submit technical proposal) with Enviroclean Sys., B-278261, Dec. 24, 1997, 97-2 CPD ¶ 172 (finding that the Army reasonably concluded that discussions might be required before award).
2. A Request for Proposals (RFP) by any other name is still a RFP. Balimoy Mfg. Co. of Venice, Inc., B-253287.2, Oct. 5, 1993, 93-2 CPD ¶ 207 (finding that an IFB that calls for the evaluation of factors other than price is not an IFB).

D. Comparing the Two Methods.

	<u>Sealed Bidding</u>	<u>Negotiations</u>
<u>Evaluation Criteria</u>	Price and Price-Related Factors	Price and Non-Price Factors
<u>Responsiveness</u>	Determined at Bid Opening	N/A
<u>Responsibility</u>	Based on Pre-Award Survey; SBA May Issue COC	May be Evaluated Comparatively Based on Disclosed Factors
<u>Contract Type</u>	FFP or FP w/EPA	Any Type
<u>Discussions</u>	Prohibited	Required (Unless Properly Awarding w/o

		Discussions)
<u>Right to Withdraw</u>	Firm Bid Rule	No Firm Bid Rule
<u>Public Bid Opening</u>	Yes	No
<u>Flexibility to Use Judgment</u>	None	Much
<u>Late Offer/Modifications</u>	Narrow Exceptions	Narrow Exceptions
<u>Past Performance</u>	Evaluated on a Pass/Fail Basis as Part of the Responsibility Determination	Included as an Evaluation Factor; Comparatively Assessed; Separate from the Responsibility Determination

### III. CONDUCTING COMPETITIVE NEGOTIATIONS.

- A. Developing a Request for Proposals (RFP). The three major sections of a RFP are: Specifications (Section C), Instructions to Offerors (Section L), and Evaluation Criteria (Section M). Contracting activities should develop these three sections simultaneously so that they are tightly integrated. The Army's Source Selection Guide is available at: [http://dasapp.saalt.army.mil/library/Army\\_Source\\_Selection\\_Guide\\_Jun\\_2001.pdf](http://dasapp.saalt.army.mil/library/Army_Source_Selection_Guide_Jun_2001.pdf).
  1. Section C describes the required work.
  2. Section L describes what information offerors should provide in their proposals and prescribes the format.
    - a. Instructions reduce the need for discussions merely to understand the offerors' proposals.

- b. Instructions also make the evaluation process more efficient by dictating page limits, paper size, organization, and content.  
[NOTE: An offeror ignores these instructions and limitations at its peril. See Coffman Specialists, Inc., B-284546; B-284546.2, May 10, 2000, 2000 U.S. Comp. Gen. LEXIS 58 (agency reasonably downgraded a proposal that failed to comply with solicitation's formatting requirement). See also U.S. Envtl. & Indus., Inc., B-257349, July 28, 1994, 94-2 CPD ¶ 51 (concluding that the agency properly excluded the protester from the competitive range after adjusting its proposal length for type size smaller than the minimum allowed and refusing to consider the "excess" pages)].

3. Section M describes how the government will evaluate proposals.

- a. The criteria must be detailed enough to address all aspects of the required work, yet not so detailed as to mask differences in proposals.
- b. Solicitations must provide offerors enough information to compete equally and intelligently, but they need not give precise details of the government's evaluation plan. See QualMed, Inc., B-254397.13, July 20, 1994, 94-2 CPD ¶ 33.
- c. Evaluation scheme must include an adequate basis to determine cost to the government. S.J. Thomas Co, Inc., B-283192, Oct. 20, 1999, 99-2 CPD ¶ 73.

B. Drafting Evaluation Criteria.

1. Statutory Requirements.

- a. 10 U.S.C. § 2305(a)(2) and 41 U.S.C. § 253a(b) require each solicitation to include a statement regarding:
  - (1) All the significant factors and subfactors the agency reasonably expects to consider in evaluating the proposals;  
and

- (2) The relative importance of each factor and subfactor.

See FAR 15.304(d).

- b. 10 U.S.C. § 2305(a)(3) and 41 U.S.C. § 253a(c) further require agency heads to:
  - (1) Clearly establish the relative importance of the evaluation factors and subfactors, including the quality factors and subfactors;
  - (2) Include cost/price as an evaluation factor; and
  - (3) Disclose whether all of the non-cost and non-price factors, when combined, are:
    - (a) Significantly more important than cost/price;
    - (b) Approximately equal in importance to cost/price; or
    - (c) Significantly less important than cost/price.

See FAR 15.304(e).

- c. Agencies occasionally omit either: (1) significant evaluation factors and subfactors; (2) their relative importance; or (3) both. See Stone & Webster Eng'g Corp., B-255286.2, Apr. 12, 1994, 94-1 CPD ¶ 306 (finding no prejudice even though the evaluation committee applied different weights to the evaluation factors without disclosing them); cf. Danville-Findorff, Ltd., B-241748, Mar. 1, 1991, 91-1 CPD ¶ 232 (finding no prejudice even though the agency listed the relative importance of an evaluation factor as 60 in the RFP, used 40 as the weight during evaluation, and used the “extra” 20 points for an unannounced evaluation factor).

- d. While procuring agencies are required to identify the significant evaluation factors and subfactors, they are not required to identify the various aspects of each factor which might be taken into account, provided that such aspects are reasonably related to or encompassed by the RFP's stated evaluation criteria. NCLN20, Inc., B-287692, July 25, 2001, 2001 CPD ¶ 136.
- e. The GAO will generally excuse an agency's failure to specifically identify subfactors if the subfactors are: (1) reasonably related to the stated criteria; and (2) of relatively equal importance. See Johnson Controls World Servs., Inc., B-257431, Oct. 5, 1994, 94-2 CPD ¶ 222 (finding that "efficiency" was reasonably encompassed within the disclosed factors); AWD Tech., Inc., B-250081.2, Feb. 1, 1993, 93-1 CPD ¶ 83 (finding that the agency properly considered work on similar superfund sites even though the agency did not list it as a subfactor). The GAO, however, has held that an agency must disclose reasonably related subfactors if the agency gives them significant weight. See Devres, Inc., B-224017, 66 Comp. Gen. 121, 86-2 CPD ¶ 652 (1986) (concluding that an agency must disclose subfactors that have a greater weight than the disclosed factors).

2. Mandatory Evaluation Factors.

- a. Cost or Price. 10 U.S.C. § 2305(a)(3)(A)(ii); 41 U.S.C. § 253a(c)(1)(B); FAR 15.304(c)(1). Agencies must evaluate cost/price in every source selection. See also Spectron, Inc., B-172261, 51 Comp. Gen. 153 (1971); but see RTF/TCI/EAI Joint Venture, B-280422.3, Dec. 29, 1998, 98-2 CPD ¶ 162 (GAO denied protest alleging failure to consider price because protestor unable to show prejudice from Army's error).
- b. Technical and Management (i.e., Quality) Factors. The government must also consider quality in every source selection. See FAR 15.304(c)(2).
  - (1) The term "quality" refers to evaluation factors other than cost/price (e.g., technical capability, management capability, prior performance, and past performance). See 10 U.S.C. § 2305(a)(3)(A)(i); 41 U.S.C. § 253a(c)(1)(A); FAR 15.304(c)(2).

(2) FAR 15.304(a) recommends tailoring the evaluation factors and subfactors to the acquisition, and FAR 15.304(b) recommends including only evaluation factors and subfactors that:

(a) Represent key areas that the agency plans to consider in making the award decision; and

(b) Permit the agency to compare competing proposals meaningfully.

c. Past Performance.

(1) Statutory Requirements.

(a) The Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 1091, 108 Stat. 3243, 3272 [hereinafter FASA], added a note to 41 U.S.C. § 405 expressing Congress' belief that agencies should use past performance as an evaluation factor because it is an indicator of an offeror's ability to perform successfully on future contracts.

(b) The FASA also directed the Administrator of the Office of Federal Procurement Policy (OFPP) to provide guidance to executive agencies regarding the use of past performance information in awarding contracts. 41 U.S.C. § 405(j).

- (c) The OFFP publishes [A Guide to Best Practices for Past Performance](http://www.acqnet.gov/Library/OFPP/BestPractices/pastpeformguide.htm), May 2000 (available at <http://www.acqnet.gov/Library/OFPP/BestPractices/pastpeformguide.htm>). The Office of the Under Secretary of Defense for Acquisition, Technology and Logistics issues [A Guide to Collection and Use of Past Performance Information](http://www.acq.osd.mil/dpap/Docs/PPI_Guide_2003_final.pdf) (available at [http://www.acq.osd.mil/dpap/Docs/PPI\\_Guide\\_2003\\_final.pdf](http://www.acq.osd.mil/dpap/Docs/PPI_Guide_2003_final.pdf)). The Air Force also has a very good Past Performance Evaluation Guide (available at <http://www.safaq.hq.af.mil/contracting/affars/5315/informational/past-performance-guide-mar03.doc>).
- (2) FAR Requirements. FAR 15.304(c)(3); FAR 15.305(a)(2).
- (a) Agencies must include past performance as an evaluation factor in all RFPs issued on or after 1 January 1999 with an estimated value in excess of \$100,000.
  - (b) On January 29, 1999, the Director of Defense Procurement issued a class deviation. DAR Tracking Number: 99-O0002. For the Department of Defense, past performance is mandatory only for the following contracts:
    - (i) Systems & operation support > \$5 million.
    - (ii) Services, information technology, or science & technology > \$1 million.
    - (iii) Fuels or health care > \$100,000.
  - (c) The contracting officer may make a determination that past performance is not an appropriate evaluation factor even if the contract falls in either category (a) or (b).
  - (d) The RFP must:



- (i) Describe how the agency plans to evaluate past performance;
- (ii) Provide offerors with an opportunity to identify past or current contracts for similar work; and
- (iii) Provide offerors an opportunity to provide information regarding any problems they encountered on the identified contracts and their corrective actions.

d. Small Business Participation.

- (1) FAR Requirements. FAR 15.304(c)(4). Agencies must evaluate the extent to which small disadvantaged business concerns will participate in the performance of:

- (a) Unrestricted acquisitions expected to exceed \$500,000; and
- (b) Construction contracts expected to exceed \$1 million.

But see FAR 19.201 and FAR 19.1202 (imposing additional limitations).

- (2) DOD Requirements. DFARS 215.304. Agencies must evaluate the extent to which small businesses and historically black colleges will participate in the performance of the contract if:

- (a) The FAR requires the use of FAR 52.219-9, Small Business Subcontracting Plan (see FAR 19.708; see also FAR 15.304(c)(4)), and
- (b) The agency plans to award the contract on a best value or tradeoff basis.

3. Requirement to Disclose Relative Importance. FAR 15.304(d).
  - a. Agencies must disclose the relative importance of all significant evaluation factors and subfactors.
  - b. Agencies may disclose the relative order of importance by:
    - (1) Providing percentages or numerical weights<sup>1</sup> in the RFP;
    - (2) Providing an algebraic paragraph;
    - (3) Listing the factors or subfactors in descending order of importance; or
    - (4) Using a narrative statement.

But see Health Servs. Int'l, Inc., B-247433, June 5, 1992, 92-1 CPD ¶ 493 (finding that the agency misled offerors by listing equal factors in “descending order of importance”).

- c. The GAO presumes that all of the listed factors are equal if the RFP does not state their relative order of importance. See North-East Imaging, Inc., B-256281, June 1, 1994, 94-1 CPD ¶ 332; cf. Isratex, Inc. v. United States, 25 Cl. Ct. 223 (1992).
  - (1) The better practice is to state the relative order of importance expressly.
  - (2) Agencies should rely on the “presumed equal” line of cases only when a RFP inadvertently fails to state the relative order of importance. See High-Point Schaer, B-242616, May 28, 1991, 70 Comp. Gen. 525, 91-1 CPD ¶ 509 (applying the “equal” presumption).

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<sup>1</sup> On 5 March 2001, Mr. Elgart, Acting Deputy Assistant Secretary of the Army (Procurement), issued a memorandum prohibiting the use of numerical weighting to evaluate proposals in the Army. Numerical weighting is no longer an authorized method of expressing the relative importance of factors and subfactors. Evaluation factors and subfactors must be definable in readily understood qualitative terms (ie, adjectival, colors, or other indicators, but not numbers). See AFARS 5115.304(b)(2)(iv).

- d. Agencies need not disclose their specific rating methodology. FAR 15.304(d). See ABB Power Generation, Inc., B-272681, Oct. 25, 1996, 96-2 CPD ¶ 183.
- 4. Requirement to Disclose Basis of Award. FAR 15.101-1; FAR 15.101-2.
  - a. Agencies must disclose how they intend to make the award decision.
  - b. Agencies generally choose:
    - (1) The tradeoff process; or
    - (2) The lowest price technically acceptable process.
- 5. Problem Evaluation Factors.
  - a. Options.
    - (1) The evaluation factors should address all evaluated options clearly. A solicitation that fails to state whether the agency will evaluate options is defective. See generally FAR Subpart 17.2; see also Occu-Health, Inc., B-270228.3, Apr. 3, 1996, 96-1 CPD ¶ 196 (sustaining a protest where the agency failed to inform offerors that it would not evaluate options due to a change in its requirements).
    - (2) Agencies must evaluate options at the time of award; otherwise, they cannot exercise options unless the agency prepare a Justification and Approval (J&A). FAR 17.207(f).
  - b. Key Personnel.
    - (1) A contractor's personnel are very important in a service contract.

- (2) Evaluation criteria should address:
  - (a) The education, training, and experience of the proposed employee(s);
  - (b) The amount of time the proposed employee(s) will actually perform under the contract;
  - (c) The likelihood that the proposed employee(s) will agree to work for the contractor; and
  - (d) The impact of utilizing the proposed employee(s) on the contractor's other contracts.

See Biospherics, Inc., B-253891.2, Nov. 24, 1993, 93-2 CPD ¶ 333; cf. ManTech Advanced Sys. Int'l, Inc., B-255719.2, May 11, 1994, 94-1 CPD ¶ 326 (finding that the awardee's misrepresentation of the availability of key personnel justified overturning the award). But see SRS Tech., B-258170.3, Feb. 21, 1995, 95-1 CPD ¶ 95 (concluding that it was not improper for an offeror to provide a substitute where it did not propose the key employee knowing that he would be unavailable).

- (3) Agencies should request resumes, hiring or employment agreements, and proposed responsibilities in the RFP.

C. Notice of Intent to Hold Discussions.

- 1. 10 U.S.C. § 2305(a)(2)(B)(ii)(I) and 41 U.S.C. § 253a(b)(2)(B) require RFPs to contain either:
  - a. “[A] statement that the proposals are intended to be evaluated with, and award made after, discussions with the offerors,” or

- b. “[A] statement that the proposals are intended to be evaluated, and award made, without discussions with the offerors (other than discussion conducted for the purpose of minor clarification[s]), unless discussions are determined to be necessary.”
  2. Statutes and regulations provide no guidance on whether an agency should award with or without discussions. Contracting officers should consider factors indicating that discussions may be necessary (e.g., procurement history, competition, contract type, specification clarity, etc.). Discussions may be as short or as long as required, but offerors must be given an opportunity to revise proposals after discussions end.
  3. A protest challenging the failure to include the correct notice in the solicitation is untimely if filed after the date for receipt of initial proposals. See Warren Pumps, Inc., B-248145.2, Sept. 18, 1992, 92-2 CPD ¶ 187.
- D. Exchanges with Industry before Receipt of Proposals. The FAR encourages the early exchange of information among all interested parties to improve the understanding of the government’s requirements and industry capabilities, provided the exchanges are consistent with procurement integrity requirements. See FAR 15.201. There are many ways an agency may promote the early exchange of information, including:
  1. industry/small business conferences;
  2. draft RFPs;
  3. requests for information (RFIs);
  4. site visits.
- E. Submission of Initial Proposals.
  1. Proposal Preparation Time.

- a. Agencies must give potential offerors at least 30 days after they issue the solicitation to submit initial proposals for contracts over the simplified acquisition threshold. 41 U.S.C. § 416; 15 U.S.C. § 637(d)(3); FAR 5.203. But see FAR 12.603 and FAR 5.203, for streamlined requirements for commercial items.
- b. Amendments.
  - (1) An agency must amend the RFP if it changes its requirements (or terms and conditions) significantly. FAR 15.206 (b). See United Tel. Co. of the Northwest, B-246977, Apr. 20, 1992, 92-1 CPD ¶ 374; see also MVM, Inc. v. United States 46 Fed. Cl. 126 (2000).
  - (2) After amending the RFP, the agency must give prospective offerors a reasonable time to modify their proposals, considering the complexity of the acquisition, the agency's needs, etc. See FAR 15.206(g).

## 2. "Early" Proposals.

- a. FAR 2.101 defines "offer" as a "response to a solicitation, that, if accepted, would bind the offeror to perform the resultant contract."
- b. Agencies must evaluate offers that respond to the solicitation, even if the offer pre-dates the solicitation. STG Inc., B-285910, 2000 U.S. Comp. Gen. LEXIS 133 (Sept. 20, 2000).
- c. If agency wants to preclude evaluation of proposals received prior to RFP issue date, it must notify offerors and allow sufficient time to submit new proposals by closing date. Id. at \*5 n.3.

## 3. Late Proposals. FAR 15.208; FAR 52.215-1.

- a. A proposal is late if the agency does not receive it by the time and date specified in the RFP.
  - (1) If no time is stated, 4:30 p.m. local time is presumed.

- (2) FAR 52.215-1 sets forth the circumstances under which an agency may consider a late proposal.
    - (3) The late proposal rules mirror the late bid rules. See FAR 14.304.
  - b. Both technical and price proposals are due before the closing time. See Inland Serv. Corp., B-252947.4, Nov. 4, 1993, 93-2 CPD ¶ 266.
  - c. Agencies must retain late proposals unopened in the contracting office.
4. No “Firm Bid Rule.” An offeror may withdraw its proposal at any time before award. FAR 52.215-1(c)(8). The agency, however, only has a reasonable time in which to accept a proposal. See Western Roofing Serv., B-232666.4, Mar. 5, 1991, 70 Comp. Gen. 324, 91-1 CPD ¶ 242 (holding that 13 months was too long).
5. Oral Presentations. FAR 15.102.
- a. Offerors may present oral presentations as part of the proposal process. See NW Ayer, Inc., B-248654, 92-2 CPD ¶ 154.
  - b. The FAR does not require a particular method of recording what occurred during oral presentations, but agencies must maintain a record adequate to permit meaningful review. See Checchi & Co. Consulting, Inc., B-285777, Oct. 10, 2000, 2001 CPD ¶ 132.
  - c. Offerors must reduce their oral presentations to writing where they include material terms and conditions.
6. Confidentiality.
- a. Prospective offerors may restrict the use and disclosure of information contained in their proposals by marking the proposal with an authorized restrictive legend. FAR 52.215-1(e).

- b. Agencies must safeguard proposals from unauthorized disclosure. FAR 15.207(b).

F. Evaluation of Initial Proposals.

1. General Considerations.

- a. The composition of an evaluation team is left to the agency's discretion and the GAO will not review it absent a showing of conflict of interest or bias. See University Research Corp., B-253725.4, Oct. 26, 1993, 93-2 CPD ¶ 259.
- b. Evaluators must read the entire proposal. Intown Properties, Inc., B-262362.2, Jan. 18, 1996, 96-1 CPD ¶ 89 (record failed to demonstrate whether agency had considered information contained in offeror's best and final offer).
- c. Evaluators must be reasonable and follow the evaluation criteria in the RFP. See Marquette Med. Sys. Inc., B-277827.5; B-277827.7, Apr. 29, 1999, 99-1 CPD ¶ 90; Foundation Health Fed. Servs., Inc., B-254397.4, Dec. 20, 1993, 94-1 CPD ¶ 3.
- d. Evaluators must be consistent. If evaluators downgrade an offeror for a deficiency, they must downgrade other offerors for the same deficiency. See Park Sys. Maint. Co., B-252453, June 16, 1993, 93-1 CPD ¶ 466.
- e. Evaluators must avoid double-scoring or exaggerating the importance of a factor beyond its disclosed weight. See J.A. Jones Mgmt. Servs., B-254941.2, Mar. 16, 1994, 94-1 CPD ¶ 244.



- f. Evaluators must evaluate compliance with the stated requirements. If an offeror proposes a better—but noncompliant—solution, the agency should amend the RFP and solicit new proposals, provided the agency can do so without disclosing proprietary data. FAR 15.206(d). See Beta Analytics, Int’l, Inc. v. U.S., 44 Fed. Cl. 131 (1999); GTS Duratek, Inc., B-280511.2, B-285011.3, Oct. 19, 1998, 98-2 CPD ¶ 130; Labat-Anderson Inc., B-246071, Feb. 18, 1992, 92-1 CPD ¶ 193; cf. United Tel. Co. of the Northwest, B-246977, Apr. 20, 1992, 92-1 CPD ¶ 374 (holding that substantial changes required the agency to cancel and reissue the RFP).
- g. Evaluators may consider matters outside the offerors’ proposals if their consideration of such matters is not unreasonable or contrary to the stated evaluation criteria. See Intermagnetics Gen. Corp.—Recon., B-255741.4, Sept. 27, 1994, 94-2 CPD ¶ 119.
- h. Agencies may not downgrade past performance rating based on offeror’s history of filing claims. See AmClyde Engineered Prods. Co., Inc., B-282271, June 21, 1999, 99-2 CPD ¶ 5. On 1 April 2002, the Office of Federal Procurement Policy instructed all federal agencies that the “filing of protests, the filing of claims, or the use of Alternative Dispute Resolution, must not be considered by an agency in either past performance or source selection decisions.”<sup>2</sup>
- i. A “cost/technical trade-off” evaluation requires evaluation of differences in technical merit beyond RFP’s minimum requirements. See Johnson Controls World Servs., Inc.; Meridian Mgmt., B-281287.5; B-281287.6; B-281287.7, June 21, 1999, 2001 CPD ¶ 3.
- j. In reviewing protests against allegedly improper evaluations, the GAO will examine the record to determine whether the agency’s evaluation was reasonable and in accordance with the solicitation’s stated evaluation criteria. MCR Fed., Inc., B-280969, Dec. 14, 1998, 99-1 CPD ¶ 8.

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<sup>2</sup> Memorandum, Angela B. Styles, Administrator, Office of Federal Procurement Policy, to Senior Procurement Executives, subject: Protests, Claims, and Alternative Dispute Resolution (ADR) as Factors in Past Performance and Source Selection Decisions (Apr. 1, 2002).

2. Evaluating Cost/Price.

- a. Contracting activities should score cost/price in dollars and avoid schemes that: (1) mathematically relate cost to technical point scores; or (2) assign point scores to cost.
- b. Evaluation scheme must be reasonable, and provide an objective basis for comparing cost to government. SmithKline Beecham Corp., B-283939, Jan. 27, 2000, 2000 CPD ¶ 19.
- c. Firm Fixed-Price Contracts. FAR 15.305(a)(1).
  - (1) Comparing proposed prices usually satisfies the requirement to perform a price analysis because an offeror's proposed price is also its probable price. See Ball Technical Prods. Group, B-224394, Oct. 17, 1986, 86-2 CPD ¶ 465. But see Triple P Servs., Inc., B-271629.3, July 22, 1996, 96-2 CPD ¶ 30 (indicating that an agency may evaluate the reasonableness of the offeror's low price to assess its understanding of the solicitation requirements if the RFP permits the agency to evaluate offerors' understanding of requirements as part of technical evaluation).
  - (2) If an agency needs to perform a cost realism analysis, the agency should base any adjustments to the offered price on identifiable costs to the government (e.g., in-house costs or life-cycle costs). See FAR 15.404-1(d). See also Futures Group Int'l, B-281274.5, 2000 U.S. Comp. Gen. LEXIS 134 (Mar. 10, 2000) (cost realism analysis must consider all information reasonably available at the time of evaluation, not just what offeror submits.)
- d. Cost Reimbursement Contracts. FAR 15.305(a)(1).

- (1) Agencies should perform a cost realism analysis and evaluate an offeror's probable cost of accomplishing the solicited work, rather than its proposed cost.<sup>3</sup> See FAR 15.404-1(d); see also Kinton, Inc., B-228260.2, Feb. 5, 1988, 67 Comp. Gen. 226, 88-1 CPD ¶ 112 (indicating that it is improper for an agency to award based on probable costs without a detailed cost analysis or discussions with the offeror).
- (2) Agencies should evaluate cost realism consistently from one proposal to the next.
  - (a) Agencies should consider all cost/price elements. It is unreasonable to ignore unpriced "other cost items," even if the exact cost of the items is not known. See Trandes Corp., B-256975.3, Oct. 25, 1994, 94-2 CPD ¶ 221; cf. Stapp Towing Co., ASBCA No. 41584, 94-1 BCA ¶ 26,465.
  - (b) Agencies may not apply estimated adjustment factors mechanically. A proper cost realism analysis requires the agency to analyze each offeror's proposal independently based on its particular circumstances, approach, personnel, and other unique factors. See The Jonathan Corp., B-251698.3, May 17, 1993, 93-2 CPD ¶ 174; Bendix Field Eng'g Corp., B-246236, Feb. 25, 1992, 92-1 CPD ¶ 227.

3. Scoring Technical and Management Factors. See FAR 15.305(a).

- a. Agencies possess considerable discretion in evaluating proposals, and particularly in making scoring decisions. See Billy G. Bassett, B-237331, Feb. 20, 1990, 90-1 CPD ¶ 195 (indicating that the GAO will not rescore proposals; it will only review them to ensure that the agency's evaluation is reasonable and consistent with the stated evaluation criteria). See also Antarctic Support Associates v. United States, 46 Fed. Cl. 145 (2000) (court cited precedent of requiring "great deference" in judicial review of technical matters).

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<sup>3</sup> Probable cost is the proposed cost adjusted for cost realism.

- b. Rating Methods. An agency may adopt any method it desires, provided the method is not arbitrary and does not violate any statutes or regulations. See BMY, A Div. of Harsco Corp. v. United States, 693 F. Supp. 1232 (D.D.C. 1988). At a minimum, an agency must give better proposals higher scores. See Trijicon, Inc., B-244546, Oct. 25, 1991, 71 Comp. Gen. 41, 91-2 CPD ¶ 375 (concluding that the agency failed to rate proposals that exceeded the minimum requirements higher than those offering the minimum). An agency may give higher scores to proposals that exceed the minimum requirements, even if the RFP does not disclose how much extra credit will be given under each subfactor. See PCB Piezotronics, Inc., B-254046, Nov. 17, 1993, 93-2 CPD ¶ 286.
- (1) Numerical.<sup>4</sup> An agency may use point scores to rate individual evaluation factors. But see Modern Tech. Corp., B-236961.4, Mar. 19, 1990, 90-1 CPD ¶ 301 (questioning the use of arithmetic scores to determine proposal acceptability). The agency, however, should only use point scores as guides in making the award decision. See Telos Field Eng'g, B-253492.6, Dec. 15, 1994, 94-2 CPD ¶ 240 (concluding that it was unreasonable for the agency to rely on points alone, particularly when the agency calculated the points incorrectly).
- (2) Adjectives. An agency may use adjectives (e.g., excellent, good, satisfactory, marginal, and unsatisfactory)—either alone or in conjunction with other rating methods—to indicate the degree to which an offeror's proposal meets the requisite standards for each evaluation factor. See Hunt Bldg. Corp., B-276370, June 6, 1997, 98-1 CPD ¶ 101 (denying a challenge to the assigned adjectival ratings where the evaluators adequately documented the different features offered by each firm and conveyed the comparative merits of the proposals to the selection official); see also FAR 15.305(a); Biospherics Incorp., B-278508.4; B-278508.5; B-278508.6, Oct 6, 1998, 98-2 CPD ¶ 96 (holding that while adjectival ratings and point scores are useful guides to decision making, they must be supported by documentation of the relative differences between proposals).

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<sup>4</sup> See supra note 1 for Army policy regarding use of numerical scoring.

- (3) Colors. An agency may use colors in lieu of adjectives to indicate the degree to which an offeror's proposal meets the requisite standards for each evaluation factor.
  - (4) Narrative. An agency must provide a narrative to rate the strengths, weaknesses, and risks of each proposal. The narrative provides the basis for the source selection decision; therefore, the narrative should reflect the relative importance of the evaluation factors accurately.
  - (5) GO/NO GO. The FAR does not prohibit a pure pass/fail method, but the GAO disfavors it. See CompuChem Lab., Inc., B-242889, June 19, 1991, 91-1 CPD ¶ 572. Because pass/fail criteria imply a minimum acceptable level, these levels should appear in the RFP. See National Test Pilot School, B-237503, Feb. 27, 1990, 90-1 CPD ¶ 238 (holding that award to the low-cost, technically acceptable proposal was inconsistent with the statement that the technical factors were more important than cost).
  - (6) Dollars. This system translates the technical evaluation factors into dollars that are added or subtracted from the evaluated price to get a final dollar price adjusted for technical quality. See DynCorp, B-245289.3, July 30, 1992, 93-1 CPD ¶ 69.
- c. Agencies must reconcile adverse information when performing technical evaluation. See Maritime Berthing, Inc., B-284123.3, Apr. 27, 2000, 2000 CPD ¶ 89.
  - d. A responsibility determination is not strictly part of the technical evaluation, but the evaluation process may include consideration of responsibility matters. See Applied Eng'g Servs., Inc., B-256268.5, Feb. 22, 1995, 95-1 CPD ¶ 108. If responsibility matters are considered without a comparative evaluation of offers, however, a small business found technically unacceptable may appeal to the SBA for a COC. See Docusort, Inc., B-254852, Jan. 25, 1994, 94-1 CPD ¶ 38.

- e. Ratings are merely guides for intelligent decision making in the procurement process. See Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281281.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 11. The focus in the source selection decision should be the underlying bases for the ratings, considered in a fair and equitable manner consistent with the terms of the RFP. See Mechanical Equipment Company, Inc., et al., B-292789.2, *et al.*, Dec. 15, 2003.
4. Evaluating Past Performance or Experience. See John Brown U.S. Servs., Inc., B-258158, Dec. 21, 1994, 95-1 CPD ¶ 35 (comparing the evaluation of past performance and past experience). See also the OFFP, DoD, and AF guidance, supra at III (B)(2)(c)(1)(c).
- a. Using the Experience of Others. Agencies may attribute the past performance or experience of parents, affiliates, subsidiaries, officers, and team members, although doing so can be difficult. See U.S. Textiles, Inc., B-289685.3, Dec. 19, 2002, Oklahoma County Newspapers, Inc., B-270849, May 6, 1996, 96-1 CPD ¶ 213; Tuscon Mobilephone, Inc., B-258408.3, June 5, 1995, 95-1 CPD ¶ 267; Aid Maint. Co., B-255552, Mar. 9, 1994, 94-1 CPD ¶ 188; FMC Corp., B-252941, July 29, 1993, 93-2 CPD ¶ 71; Pathology Assocs., Inc., B-237208.2, Feb. 20, 1990, 90-1 CPD ¶ 292.
  - b. Comparative Evaluations of Small Businesses' Past Performance.
    - (1) If an agency comparatively evaluates offerors' past performance, small businesses may not use the SBA's Certificate of Competency (COC) procedures to review the evaluation. See Nomura Enter., Inc., B-277768, Nov. 19, 1997, 97-2 CPD ¶ 148; Smith of Galetton Gloves, Inc., B-271686, July 24, 1996, 96-2 CPD ¶ 36.
    - (2) If an agency fails to state that it will consider responsibility-type factors, small businesses may seek a COC. See Envirosol, Inc., B-254223, Dec. 2, 1993, 93-2 CPD ¶ 295; Flight Int'l Group, Inc., B-238953.4, Sept. 28, 1990, 90-2 CPD ¶ 257.

- (3) If an agency uses pass/fail scoring for a responsibility-type factor, small businesses may seek a COC. See Clegg Indus., Inc., B-242204, Aug. 14, 1991, 70 Comp. Gen. 680, 91-2 CPD ¶ 145.

c. Evidence of Past Performance.

- (1) Agencies may consider their own past experience with an offeror rather than relying solely on the furnished references. See Birdwell Bros. Painting and Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129.
- (2) In KMS Fusion, Inc., B-242529, May 8, 1991, 91-1 CPD ¶ 447, an agency properly considered extrinsic past performance evidence when past performance was a disclosed evaluation factor. In fact, ignoring extrinsic evidence may be improper. See SCIENTECH, Inc., B-277805.2, Jan. 20, 1998, 98-1 CPD ¶ 33; cf. Aviation Constructors, Inc., B-244794, Nov. 12, 1991, 91-2 CPD ¶ 448.
- (3) Past Performance Evaluation System. FAR Subpart 42.15.
  - (a) Agencies must establish procedures for collecting and maintaining performance information on contractors. These procedures should provide for input from technical offices, contracting offices, and end users. FAR 42.1503.
  - (b) Agencies must prepare performance evaluation reports for each contract in excess of \$100,000. FAR 42.1502.

- d. Agencies must make rational—rather than mechanical—comparative past performance evaluations. In Green Valley Transportation, Inc., B-285283, Aug. 9, 2000, 2000 CPD ¶ 133, GAO found unreasonable an agency’s use of absolute numbers of performance problems, without considering the “size of the universe of performance” where problems occurred.

- e. Lack of past performance history should not bar new firms from competing for government contracts. See Espey Mfg. & Elecs. Corp., B-254738, Mar. 8, 1994, 94-1 CPD ¶ 180; cf. Laidlaw Envtl. Servs., Inc., B-256346, June 14, 1994, 94-1 CPD ¶ 365 (permitting the agency to give credit for commercial past performance if it is equivalent to comparable prior government experience). Agencies must give a neutral rating to firms “without a record of relevant past performance.” FAR 15.305(a)(2)(iv). See Excalibur Sys., Inc., B-272017, July 12, 1996, 96-2 CPD ¶ 13 (holding that a neutral rating does not preclude award to a higher-priced, higher technically-rated offeror in a best value procurement).
  - f. Agencies must clarify adverse past performance information when there is a clear basis to question the past performance information. See A.G. Cullen Construction, Inc., B-284049.2, Feb. 22, 2000, 2000 CPD ¶ 145.
  - g. The Air Force has issued a guide on Performance Price Tradeoffs dated May 2005 which can be found at <https://www.safaq.hq.af.mil/contracting/affars/5315/informational/ppt-guide-may05.doc>.
5. Scoring disparities are not objectionable or unusual. See Resource Applications, Inc., B-274943.3, Mar. 5, 1997, 97-1 CPD ¶ 137 (finding that the consensus score accurately reflected the proposal’s merit, even though it was higher than any of the individual evaluator’s scores); Executive Security & Eng’g Tech., Inc., B-270518, Mar. 15, 1996, 96-1 CPD ¶ 156 (holding that the mere presence of apparent inconsistencies is not a basis for disturbing the award); Dragon Servs., Inc., B-255354, Feb. 25, 1994, 94-1 CPD ¶ 151 (noting that the individual evaluators’ ratings may differ from the consensus evaluation). Consistency from one proposal to the next, however, is essential. See Myers Investigative and Security Services, Inc., B-288468, Nov. 8, 2001, 2001 CPD ¶ 189 (finding unreasonable an award based on the agency’s unequal treatment in assessing the past performance of the protestor and awardee).
6. Products of the Evaluation Process.
- a. Evaluation Report.



- (1) The evaluators must prepare a report of their evaluation. See Son's Quality Food Co., B-244528.2, Nov. 4, 1991, 91-2 CPD ¶ 424; Amtec Corp., B-240647, Dec. 12, 1990, 90-2 CPD ¶ 482.
  - (2) The contracting officer should retain all evaluation records. See FAR 4.801; FAR 4.802; FAR 4.803; see also United Int'l Eng'g, Inc., B-245448.3, Jan. 29, 1992, 71 Comp. Gen. 177, 92-1 CPD ¶ 122; Southwest Marine, Inc., B-265865.3, Jan. 23, 1996, 96-1 CPD ¶ 56.
  - (3) If evaluators use numerical scoring, they should explain the scores. See J.A. Jones Mgmt Servs, Inc., B-276864, Jul. 24, 1997, 97-2 CPD ¶ 47; TFA, Inc., B-243875, Sept. 11, 1991, 91-2 CPD ¶ 239; S-Cubed, B-242871, June 17, 1991, 91-1 CPD ¶ 571.
  - (4) Evaluators should ensure that their evaluations are reasonable. See DNL Properties, Inc., B-253614.2, Oct. 12, 1993, 93-2 CPD ¶ 301.
- b. Deficiencies. The initial evaluation must identify all parts of the proposals that fail to meet the government's minimum requirements.
  - c. Advantages and Disadvantages. The initial evaluation should identify the positive and negative aspects of acceptable proposals.
  - d. Questions and Items for Negotiation. The initial evaluation should identify areas where discussions are necessary/desirable.
  - e. Competitive Range Recommendation. The evaluation report should recommend the proposals to include in a competitive range.

G. Award Without Discussions.

1. Recent History of Award Without Discussions.

a. Before 1990, agencies could only award on initial proposals if the most favorable proposal also resulted in the lowest overall cost to the government.

(1) In 1990, Congress lifted this restriction for defense agencies. National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 802, 104 Stat. 1589 (1990).

(2) In 1994, Congress lifted this restriction for civilian agencies. FASA § 1061 (amending 41 U.S.C. § 253a).

b. An agency may not award on initial proposals if it:

(1) States its intent to hold discussion in the solicitation; or

(2) Fails to state its intent to award without discussions in the solicitation.

c. A proper award on initial proposals need not result in the lowest overall cost to the government.

2. To award without discussions, an agency must:

a. Give notice in the solicitation that it intends to award without discussions;

b. Select a proposal for award which complies with all of the material requirements of the solicitation;

c. Properly evaluate the selected proposal in accordance with the evaluation factors and subfactors set forth in the solicitation;

d. Not have a contracting officer determination that discussions are necessary; and

- e. Not conduct discussions with any offeror, other than for the purpose of minor clarifications.

See TRI-COR Indus., B-252366.3, Aug. 25, 1993, 93-2 CPD ¶ 137.

3. Discussions v. Clarifications. FAR 15.306(a), (d).

- a. Award without discussions means **NO DISCUSSIONS**.

- (1) “Discussions” are “negotiations that occur after establishment of the competitive range that may, at the Contracting Officer’s discretion, result in the offeror being allowed to revise its proposal.” FAR 52.215-1(a).

- (a) The COFC has found “mutual exchange” a key element in defining discussions. See Cubic Defense Systems, Inc. v. United States, 45 Fed. Cl. 450 (2000).

- (b) The GAO has focused on “opportunity to revise” as the key element. See MG Industries, B-283010.3, Jan. 24, 2000, 2000 CPD ¶ 17.

- (2) An agency may not award on initial proposals if it conducts discussions with any offeror. See To the Sec’y of the Navy, B-170751, 50 Comp. Gen. 202 (1970); see also Strategic Analysis, Inc., 939 F. Supp. 18 (D.D.C. 1996) (concluding that communications with one offeror concerning the employment status of its proposed key personnel were discussions). But see Data General Corp. v. Johnson, 78 F.3d 1556 (Fed. Cir. 1996) (refusing to sustain a protest because the protester could not show that there was a “reasonable likelihood” that it would have been awarded the contract in the absence of the improper discussions).

- b. An agency, however, may “clarify” offerors’ proposals.

- (1) “Clarifications” are “limited exchanges, between the Government and offerors, that may occur when award without discussions is contemplated.” FAR 15.306(a).
- (2) Clarifications include:
  - (a) The opportunity to clarify—rather than revise—certain aspects of an offeror’s proposal (e.g., the relevance of past performance information to which the offeror has not previously had an opportunity to respond); and
  - (b) The opportunity to resolve minor irregularities, informalities, or clerical errors.
  - (c) The parties’ actions control the determination of whether “discussions” have been held and not the characterization by the agency. See Priority One Services, Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 (finding “discussions” occurred where awardee was allowed to revise its technical proposal, even though the source selection document characterized the communication as a “clarification”).

c. Examples.

- (1) The following are “discussions”:
  - (a) The substitution of resumes for key personnel. See University of S.C., B-240208, Sept. 21, 1990, 90-2 CPD ¶ 249; Allied Mgmt. of Texas, Inc., B-232736.2, May 22, 1989, 89-1 CPD ¶ 485. But see SRS Tech., B-258170.3, Feb. 21, 1995, 95-1 CPD ¶ 95.
  - (b) Allowing an offeror to explain a warranty provision. See Cylink Corp., B-242304, Apr. 18, 1991, 91-1 CPD ¶ 384.

(2) The following are not “discussions”.

- (a) Audits. See Data Mgmt. Servs., Inc., B-237009, Jan. 12, 1990, 69 Comp. Gen. 112, 90-1 CPD ¶ 51.
- (b) Allowing an offeror to correct a minor math error, correct a certification, or acknowledge a nonmaterial amendment. See E. Frye Enters., Inc., B-258699, Feb. 13, 1995, 95-1 CPD ¶ 64; cf. Telos Field Eng'g, B-253492.2, Nov. 16, 1993, 93-2 CPD ¶ 275.
- (c) A request to extend the proposal acceptance period. See GPSI-Tidewater, Inc., B-247342, May 6, 1992, 92-1 CDP ¶ 425.

d. Minor clerical errors should be readily apparent to both parties.

- (1) If the agency needs an answer before award, the question probably rises to the level of discussions.
- (2) The only significant exception to this rule involves past performance data.

#### H. Determination to Conduct Discussions.

- 1. To conduct discussions with one or more offerors after stating an intent to award without discussions, the contracting officer must find that discussions are necessary and document this conclusion in writing. 10 U.S.C. § 2305(b); 41 U.S.C. § 253a(b)(2)(B)(i).
- 2. Statutes and implementing regulations provide little guidance for making this determination. A contracting officer should consider factors such as favorable but noncompliant proposals, unclear proposals, incomplete proposals, unreasonable costs/prices, suspected mistakes, and changes/clarifications to specifications See Milcom Sys. Corp., B-255448.2, May 3, 1994, 94-1 CPD ¶ 339.

I. Communications. FAR 15.306(b).

1. The contracting officer may need to hold “communications” with some offerors before establishing the competitive range.
2. “Communications” are “exchanges of information, between the Government and offerors, after receipt of proposals, leading to establishment of the competitive range.” FAR 15.306(b).
3. The purpose of communications is to help the contracting officer and/or the evaluators:
  - a. Understand and evaluate proposals; and
  - b. Determine whether to include a proposal in the competitive range. FAR 15.306(b)(2) and (3).
4. The parties, however, cannot use communications to permit an offeror to revise its proposal. FAR 15.306(b)(2).
5. The contracting officer must communicate with offerors who will be excluded from the competitive range because of adverse past performance information. Such communications must give an offeror an opportunity to respond to adverse past performance information to which it has not previously had an opportunity to respond. FAR 15.306(1)(i).
6. The contracting officer may also communicate with offerors who are neither clearly in nor clearly out of the competitive range. FAR 15.306(b)(1)(ii). The contracting officer may address “gray areas” in an offeror’s proposal (e.g., perceived deficiencies, weaknesses, errors, omissions, or mistakes). FAR 15.306(b)(3).

J. Establishing the Competitive Range. FAR 15.306(c).

1. The competitive range is the group of offerors with whom the contracting officer will conduct discussions, and from whom the agency will seek revised proposals.

2. The contracting officer (or SSA) may establish the competitive range any time after the initial evaluation of proposals. See SMB, Inc., B-252575.2, July 30, 1993, 93-2 CPD ¶ 72.
3. The contracting officer must consider all of the evaluation factors (including cost/price) in making the determination. See Kathpal Technologies, Inc., B-283137.3, Dec. 30, 1999, 2000 CPD ¶ 6.
  - a. The contracting officer may exclude a proposal from the competitive range despite its lower cost or the weight accorded cost in the RFP if the proposal is technically unacceptable. See Crown Logistics Servs., B-253740, Oct. 19, 1993, 93-2 CPD ¶ 228.
  - b. The contracting officer may exclude an unacceptable proposal that requires major revisions to become acceptable if including the proposal in the competitive range would be tantamount to allowing the offeror to submit a new proposal. See Harris Data Communications v. United States, 2 Cl. Ct. 229 (1983), aff'd, 723 F.2d 69 (Fed. Cir. 1983); see also Strategic Sciences and Tech., Inc., B-257980, 94-2 CPD ¶ 194 (holding that it was reasonable for the agency to exclude an offeror who proposed inexperienced key personnel—which was the most important criteria—from the competitive range); InterAmerica Research Assocs., Inc., B-253698.2, Nov. 19, 1993, 93-2 CPD ¶ 288 (holding that it was proper for the agency to exclude an offeror that merely repeated back language from solicitation and failed to provide required information).
4. The contracting officer must include all of the “most highly rated proposals” in the competitive range unless the contracting officer decides to reduce the competitive range for purposes of efficiency. See FAR 15.306(c)(2).

- a. The GAO ordinarily gives great deference to the agency. To prevail, a protester must show that the decision to exclude it was: (1) clearly unreasonable; or (2) inconsistent with the stated evaluation factors. See Mainstream Eng'g Corp., B-251444, Apr. 8, 1993, 93-1 CPD ¶ 307; cf. Intertec Aviation, B-239672, Sept. 19, 1990, 69 Comp. Gen. 717, 90-2 CPD ¶ 232 (holding that the agency improperly excluded an offeror from the competitive range where its alleged technical deficiencies were minor, its cost was competitive, and the agency's action seriously reduced available competition).
  - b. If the contracting officer has any doubts about whether to exclude a proposal from the competitive range, the contracting officer should leave it out. In the past, agencies generally included any proposal in the competitive range that had a reasonable chance of receiving award. With the FAR rewrite in 1997, the drafters intended to permit a competitive range more limited than under the "reasonable chance of receiving award" standard. See SDS Petroleum Prods., B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59.
5. The contracting officer may limit the number of proposals in the competitive range to "the greatest number that will permit an efficient competition among the most highly rated offerors" if: (a) The agency notified offerors in the solicitation that the contracting officer may limit the competitive range for purposes of efficiency; and (b) The contracting officer determines that the number of proposals the contracting officer would normally include in the competitive range is too high to permit efficient competition.



6. The contracting officer must continually reassess the competitive range. If after discussions have begun, an offeror is no longer considered to be among the most highly rated, the contracting officer may eliminate that offeror from the competitive range despite not discussing all material aspects in the proposal. The excluded offeror will not receive an opportunity to submit a proposal revision. FAR 15.306(d)(5).
7. Common Errors.
  - a. Reducing competitive range to one proposal. A competitive range of one is not “per se” illegal or improper. See Clean Svs. Co., Inc., B-281141.3, Feb. 16, 1999, 99-1 CPD ¶ 36; SDS Petroleum Prods., B-280430 Sept. 1, 1998, 98-2 CPD ¶ 59 (concluding that the new standard for establishing the competitive range does not preclude a range of one per se). However, a contracting officer’s decision to reduce a competitive range to one offeror will receive “close scrutiny.” See Rockwell Int’l Corp. v. United States, 4 Cl. Ct. 1 (1983); Aerospace Design, Inc., B-247793, July 9, 1992, 92-2 CPD ¶ 11.
  - b. Excluding an offeror from the competitive range for omissions that the offeror could easily correct during discussions. See Dynalantic Corp., B-274944.2, Feb. 25, 1997, 97-1 CPD ¶ 101.
  - c. Using predetermined cutoff scores. See DOT Sys., Inc., B-186192, July 1, 1976, 76-2 CPD ¶ 3.
  - d. Excluding an offeror from the competitive range for “nonresponsiveness.”
    - (1) An offeror may cure a material defect in its initial offer during negotiations; therefore, material defects do not necessarily require exclusion from the competitive range. See ManTech Telecomm & Info. Sys. Corp., 49 Fed. Cl. 57 (2001).
    - (2) The concept of “responsiveness” is incompatible with the concept of a competitive range. See Consolidated Controls Corp., B-185979, Sept. 21, 1976, 76-2 CPD ¶ 261.

K. Conducting Discussions. FAR 15.306(d).

1. The contracting officer must conduct oral or written discussions with each offeror in the competitive range. FAR 15.306(d)(1).
  - a. The contracting officer may not hold discussions with only one offeror. See Raytheon Co., B-261959.3, Jan. 23, 1996, 96-1 CPD ¶ 37 (stating that the “acid test” of whether discussions have been held is whether an offeror was provided the opportunity to modify/revise its proposal).
  - b. The contracting officer may hold face-to-face discussions with some—but not all—offerors, provided the offerors with whom the contracting officer did not hold face-to-face discussions are not prejudiced. See Data Sys. Analysts, Inc., B-255684, Mar. 22, 1994, 94-1 CPD ¶ 209.
2. The contracting officer determines the scope and extent of the discussions; however, the discussion must be fair and meaningful.
  - a. The contracting officer must discuss any matter that the RFP states the agency will discuss. See Daun-Ray Casuals, Inc., B-255217.3, 94-2 CPD ¶ 42 (holding that the agency’s failure to provide an offeror with an opportunity to discuss adverse past performance information was improper—even though the offeror received a satisfactory rating—because the RFP indicated that offerors would be allowed to address unfavorable reports).
  - b. The contracting officer must tailor discussions to the offeror’s proposal. FAR 15.306(d)(1). See Cherokee Info. Svs., B-287270, April 12, 2001, 2001 CPD ¶ 61 (citing The Pragma Group, B-255236, et al., Feb 18, 1994, 94-1 CPD ¶ 124).

- c. At a minimum, the contracting officer must notify each offeror in the competitive range of deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had the opportunity to respond. FAR 15.306(d)(3). But see FAR 15.306(d)(5) (indicating that the contracting officer may eliminate an offeror's proposal from the competitive range after discussions have begun, even if the contracting officer has not discussed all material aspects of the offeror's proposal or given the offeror an opportunity to revise it).

(1) Deficiencies.

- (a) A "deficiency" is "a material failure . . . to meet a Government requirement or a combination of significant weaknesses . . . that increases the risk of unsuccessful contract performance to an unacceptable level." FAR 15.001. See CitiWest Properties, Inc., B-274689, Nov. 26, 1997, 98-1 CPD ¶ 3; Price Waterhouse, B-254492.2, Feb. 16, 1994, 94-1 CPD ¶ 168; Columbia Research Corp., B-247631, June 22, 1992, 92-1 CPD ¶ 536.
- (b) The contracting officer does not have to specifically identify each deficiency. Instead, the contracting officer merely has to lead the contractor into areas requiring improvement. See Du & Assocs., Inc., B-280283.3, Dec. 22, 1998, 98-2 CPD ¶ 156; Arctic Slope World Services, Inc., B-284481, B-284481.2, Apr. 27, 2000, 2000 CPD ¶ 75.
- (c) The contracting officer does not have to point out a deficiency if discussions cannot improve it. See Encon Mgmt., Inc., B-234679, June 23, 1989, 89-1 CPD ¶ 595 (business experience).
- (d) The contracting officer does not have to inquire into omissions or business decisions on matters clearly addressed in the solicitation. See Wade Perrow Constr., B-255332.2, Apr. 19, 1994, 94-1 CPD ¶ 266; National Projects, Inc., B-283887, Jan. 19, 2000, 2000 CPD ¶ 16.

- (e) The contracting officer does not have to actually “bargain” with an offeror. See Northwest Regional Educ. Lab., B-222591.3, Jan. 21, 1987, 87-1 CPD ¶ 74. But cf. FAR 15.306(d) (indicating that negotiations may include bargaining).

(2) Significant Weaknesses.

- (a) A “significant weakness” is “a flaw that appreciably increases the risk of unsuccessful contract performance.” FAR 15.001. Examples include:
  - (i) Flaws that cause the agency to rate a factor as marginal or poor;
  - (ii) Flaws that cause the agency to rate the risk of unsuccessful contract performance as moderate to high; and
  - (iii) Relatively minor flaws that have a significant cumulative impact (e.g., minor flaws in several areas that impact the overall rating).
- (b) The contracting officer does not have to identify every aspect of an offeror’s technically acceptable proposal that received less than a maximum score. See Robbins-Gioia, Inc., B-274318, Dec. 4, 1996, 96-2 CPD ¶ 222; SeaSpace Corp., B-252476.2, June 14, 1993, 93-1 CPD ¶ 462, recon. denied, B-252476.3, Oct. 27, 1993, 93-2 CPD ¶ 251.

- (c) In addition, the contracting officer does not have to advise an offeror of a minor weakness that the agency does not consider significant, even if it subsequently becomes a determinative factor between two closely ranked proposals. See Brown & Root, Inc. and Perini Corp., A Joint Venture, B-270505.2, Sept. 12, 1996, 96-2 CPD ¶ 143; cf. Professional Servs. Group, B-274289.2, Dec. 19, 1996, 97-1 CPD ¶ 54 (holding that the discussions were inadequate where “deficient” staffing was not revealed because the agency perceived it to be a mere “weakness”).
  - (d) The contracting officer does not have to inform offeror that its cost/price is too high where the agency does not consider the price unreasonable or a significant weakness or deficiency. See JWK Int’l Corp. v. United States, 279 F.3d 985 (Fed. Cir. 2002); SOS Interpreting, Ltd., B-287477.2, May 16, 2001, 2001 CPD ¶ 84.
- (3) Other Aspects of an Offeror’s Proposal. Although the FAR used to require contracting officers to discuss other material aspects, the rule now is that contracting officer are “encouraged to discuss other aspects of the offeror’s proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal’s potential for award (emphasis added). FAR 15.306(d)(3)
- d. Since the purpose of discussions is to maximize the agency’s ability to obtain the best value, the contracting officer should do more than the minimum necessary to satisfy the requirement for meaningful discussions. See FAR 15.306(d)(2).
- e. An agency is not obligated to spoon-feed an offeror. ITT Fed. Sys. Int’l Corp., B-285176.4, B-285176.5, Jan. 9, 2001, 2001 CPD ¶ 45 at 7.

- f. An agency is not obligated to conduct successive rounds of discussions until all proposal defects have been corrected. OMV Med., Inc., B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61 at 4.

3. Limitations on Exchanges.

a. FAR Limitations. FAR 15.306(e).

- (1) The agency may not favor one offeror over another.
- (2) The agency may not disclose an offeror's technical solution to another offeror.<sup>5</sup>
- (3) The agency may not reveal an offeror's prices without the offeror's permission.
- (4) The agency may not reveal the names of individuals who provided past performance information.
- (5) The agency may not furnish source selection information in violation of the Procurement Integrity Act (41 U.S.C. § 423).

b. Other Prohibitions. The FAR no longer includes specific prohibitions on technical leveling, technical transfusion, and auctioning; however, the Procurement Integrity Act and the Trade Secrets Act still apply.

- (1) Technical leveling involves helping an offeror bring its proposal up to the level of other proposals through successive rounds of discussion. See Creative Mgmt. Tech., Inc., B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61.

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<sup>5</sup> This prohibition includes any information that would compromise an offeror's intellectual property (e.g., an offeror's unique technology or an offeror's innovative or unique use of a commercial item). FAR 15.306(e)(2).

- (2) Technical Transfusion. Technical transfusion involves the government disclosure of one offeror's proposal to another to help that offeror improve its proposal.
- (3) Auctioning.
  - (a) Auctioning involves the practice of promoting price bidding between offerors by indicating the price offerors must beat, obtaining multiple proposal revisions, disclosing other offerors' prices, etc.
  - (b) Auctioning is not inherently illegal. See Nick Chorak Mowing, B-280011.2, Oct. 1, 1998, 98-2 CPD ¶ 82. Moreover, the GAO usually finds that preserving the integrity of the competitive process outweighs the risks posed by an auction. See Navcom Defense Electronics, Inc., B-276163.3, Oct. 31, 1997, 97-2 CPD ¶ 126; Baytex Marine Communication, Inc., B-237183, Feb. 8, 1990, 90-1 CPD ¶ 164.
  - (c) The government's estimated price will not be disclosed in the RFP.<sup>6</sup> FAR 15.306(e)(3) allows discussion of price. See National Projects, Inc., B-283887, Jan. 19, 2000, 2000 CPD ¶ 16.
    - (i) The contracting officer may advise an offeror that its price is too high or too low and reveal the results of the agency's analysis supporting that conclusion. FAR 15.306(e)(3)
    - (ii) In addition, the contracting officer may advise all of the offerors of the price that the agency considers reasonable based on its price analysis, market research, and other reviews. FAR 15.306(e)(3)

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<sup>6</sup> In the area of construction contracting the FAR requires disclosure of the magnitude of the project in terms of physical characteristics and estimated price range, but not a precise dollar amount (i.e. a range of \$100,000 to \$250,000). See FAR 36.204.

c. Fairness Considerations.

- (1) Discussions, when conducted, must be meaningful and must not prejudicially mislead offerors. See Metro Machine Corp., B-281872.2, Apr. 22, 1999, 99-1 CPD ¶ 101 (finding that a question about a proposal that did not reasonably put the offeror on notice of agency's actual concern was not adequate discussions); see also SRS Tech., B-254425.2, Sept. 14, 1994, 94-2 CPD ¶ 125 (concluding that the Navy misled the offeror by telling it that its prices were too low when all it needed was better support for its offered prices); Ranor, Inc., B-255904, Apr. 14, 1994, 94-1 CPD ¶ 258 (concluding that the agency misled the offeror and caused it to raise its price by telling it that its price was below the government estimate); DTH Mgmt. Group, B-252879.2, Oct. 15, 1993, 93-2 CPD ¶ 227 (concluding that the agency misled an offeror by telling it that its price was below the government estimate when it knew that the government estimate was faulty).
- (2) The contracting officer must provide similar information to all of the offerors. See Securiguard, Inc., B-249939, Dec. 21, 1992, 93-1 CPD ¶ 362; Grumman Data Sys. Corp. v. Sec'y of the Army, No. 91-1379, slip op. (D.D.C. June 28, 1991) (agency gave out answers, but not questions, misleading other offerors); SeaSpace Corp., B-241564, Feb. 15, 1991, 70 Comp. Gen. 268, 91-1 CPD ¶ 179.

L. Final Proposal Revisions (Formerly Known as Best and Final Offers or BAFOs). FAR 15.307.

1. Requesting final proposal revisions concludes discussions. The request must notify offerors that:
  - a. Discussions are over;
  - b. They may submit final proposal revisions to clarify and document any understandings reached during negotiations;
  - c. They must submit their final proposal revisions in writing;



- d. They must submit their final proposal revisions by the common cutoff date/time; and
  - e. The government intends to award the contract without requesting further revisions.
2. Agencies do not have to reopen discussions to address deficiencies introduced in the final proposal revision. See Ouachita Mowing, Inc., B-276075, May 8, 1997, 97-1 CPD ¶ 167; Logicon RDA, B-261714.2, Dec. 22, 1995, 95-2 CPD ¶ 286; Compliance Corp., B-254429, Dec. 15, 1993, 94-1 CPD ¶ 166.
- a. Agencies, however, must reopen discussions in appropriate cases. See TRW, Inc., B-254045.2, Jan. 10, 1994, 94-1 CPD ¶ 18 (holding that the agency erred in not conducting additional discussions where there were significant inconsistencies between technical and cost proposals that required resolution); cf. Dairy Maid Dairy, Inc., B-251758.3, May 24, 1993, 93-1 CPD ¶ 404 (holding that a post-BAFO amendment that changed the contract type from a requirements contract to a definite quantity contract was a material change that required a second round of BAFOs); Harris Corp., B-237320, Feb. 14, 1990, 90-1 CPD ¶ 276 (holding that the contracting officer properly requested additional BAFOs after amending the RFP).
  - b. Agencies may request additional BAFOs even if the offerors' prices were disclosed through an earlier protest if additional BAFOs are necessary to protect the integrity of the competitive process. BNF Tech., Inc., B-254953.4, Dec. 22, 1994, 94-2 CPD ¶ 258.
3. If the agency reopens discussions with one offeror, the agency must reopen discussions with all of the remaining offerors. See International Resources Group, B-286663, Jan. 31, 2001, 2001 CPD ¶ 35 (citing Patriot Contract Servs., LLC et al., B-278276 et al., Sept 22, 1998, 98-2 CPD ¶ 77).
4. An agency is not obligated to reopen negotiations to give an offeror the opportunity to remedy a defect that first appears in a revised proposal. American Sys. Corp., B-292755, B-292755.2, Dec. 3, 2003.

M. Selection for Award.

1. Agencies must evaluate final proposals using the evaluation factors set forth in the solicitation.
  - a. Bias in the selection decision is improper. See Latecoere Int'l v. United States, 19 F.3d 1342 (11th Cir. 1994) (stating that bias against a French firm “infected the decision not to award it the contract . . .”).
  - b. There is no requirement that the same evaluators who evaluated the initial proposals also evaluate the final proposals. See Medical Serv. Corp. Int'l, B-255205.2, April 4, 1994, 94-1 CPD ¶ 305.
2. A proposal that fails to conform to a material solicitation requirement is technically unacceptable and cannot form the basis of award. Farmland National Beef, B-286607, B-286607.2, Jan. 24, 2001, 2001 CPD ¶ 31. If the agency wants to accept an offer that does not comply with the material solicitation requirements, the agency must issue a written amendment and give all of the remaining offerors an opportunity to submit revised proposals. FAR 15.206(d). See Beta Analytics Int'l, Inc. v. U.S., 44 Fed. Cl. 131 (U.S. Ct Fed. Cl. 1999); 4th Dimension Software, Inc., B-251936, May 13, 1993, 93-1 CPD ¶ 420.
3. The evaluation process is inherently subjective.
  - a. The fact that an agency reasonably might have made another selection does not mean that the selection made was unreasonable. See Red R. Serv. Corp., B-253671.4, Apr. 22, 1994, 94-1 CPD ¶ 385. However, the decision must be based on accurate information. See CRA Associated, Inc., B-282075.2, B-282075.3, Mar. 15, 2000, 2000 CPD ¶ 63.
  - b. Point scoring techniques do not make the evaluation process objective. See VSE Corp., B-224397, Oct. 3, 1986, 86-2 CPD ¶ 392. Therefore, the RFP should not state that award will be made based on the proposal receiving the most points. See Harrison Sys. Ltd., B-212675, May 25, 1984, 84-1 CPD ¶ 572.

4. A cost/technical trade-off analysis is essential to any source selection decision using a trade-off (rather than a lowest-priced, technically acceptable) basis of award. See Special Operations Group, Inc., B-287013; B-287013.2, Mar. 30, 2001, 2001 CPD ¶ 73. More than a mere conclusion, however, is required to support the analysis. See Shumaker Trucking and Excavating Contractors, B-290732, 2002 U.S. Comp. Gen. LEXIS 151 (Sept. 25, 2002) (finding the award decision unreasonable where the “agency mechanically applied the solicitation’s evaluation method” and provided no analysis of the advantages to the awardee’s proposal); Beacon Auto Parts, B-287483, June 13, 2001, 2001 CPD ¶ 116 (finding that a determination that a price is “fair and reasonable” doesn’t equal a best-value determination); ITT Fed. Svs. Int’l Corp., B-283307, B-283307.2, Nov. 3, 1999, 99-2 CPD ¶ 76 (quoting Opti-Lite Optical, B-281693, Mar. 22, 1999, 99-1 CPD ¶ 61 at 5); Redstone Technical Servs., B-259222, Mar. 17, 1995, 95-1 CPD ¶ 181.
- a. Agencies have broad discretion in making cost/technical tradeoffs, and the extent to which one is sacrificed for the other is tested for rationality and consistency with the stated evaluation factors. See MCR Fed. Inc., B-280969, Dec. 4, 1999, 99-1 CPD ¶ 8; see also Widnall v. B3H Corp., 75 F. 3d 1577 (Fed. Cir. 1996) (stating that “review of a best value agency procurement is limited to independently determining if the agency’s decision was grounded in reason”).
- b. Beware of tradeoff techniques that distort the relative importance of the various evaluation criteria (e.g., “Dollars per Point”). See Billy G. Bassett; Lynch Dev., Inc., B-237331, Feb. 20, 1990, 90-1 CPD ¶ 195; T. H. Taylor, Inc., B-227143, Sept. 15, 1987, 87-2 CPD ¶ 252.
- c. Comparative consideration of features in competing proposals is permissible—even if those features were not given quantifiable evaluation credit under disclosed evaluation criteria—if the basis for award stated in the RFP provides for an integrated assessment of proposals. See Grumman Data Sys. Corp. v. Dep’t of the Air Force, GSBCA No. 11939-P, 93-2 BCA ¶ 25,776, aff’d sub nom. Grumman Data Sys. Corp. v. Widnall, 15 F.3d 1044 (Fed. Cir. 1994) (concluding that the SSA’s head-to-head comparison of proposals may permissibly look at features not directly evaluated).

- d. A cost/technical tradeoff analysis may consider relevant matters not disclosed in the RFP as tools to assist in making the tradeoff. See Advanced Mgmt., Inc., B-251273.2, Apr. 2, 1993, 93-1 CPD ¶ 288 (holding that it is permissible to consider that loss of efficiency in awarding to a new contractor would reduce effective price difference between the contractor and the incumbent).
  - e. Agencies should make the cost/technical tradeoff decision after receiving final proposals if final proposals were requested. See Halter Marine, Inc., B-255429, Mar. 1, 1994, 94-1 CPD ¶ 161.
5. The selection decision documentation must include the rationale for any trade-off made, “including benefits associated with additional costs.” FAR 15.308; Opti-Lite Optical, B-281693, Mar. 22, 1999, 99-1 CPD ¶ 61 (finding it improper to rely on a purely mathematical price/technical tradeoff methodology).
6. A well-written source selection memorandum should contain:
- a. A summary of the evaluation criteria and their relative importance;
  - b. A statement of the decision maker’s own evaluation of each of the proposals: (1) adopting recommendations of others or stating a personal evaluation; and (2) identifying major advantages and disadvantages of each proposal (see J&J Maintenance Inc., B-284708.2, B-284708.3, June 5, 2000, 2000 CPD ¶106); **and**
  - c. A description of the reasons for choosing the successful offeror, comparing differences in cost with differences in technical factors.
7. The source selection authority (SSA) need not personally write the decision memorandum. See Latecoere Int’l Ltd., B-239113.3, Jan. 15, 1992, 92-1 CPD ¶ 70. However, the source selection decision must represent the SSA’s independent judgment. FAR 15.308.<sup>7</sup>

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<sup>7</sup> In the Army, SSA’s “shall not receive a recommendation from any individual or body as to whom shall receive the award and additionally shall not receive a rank order or order of merit list pertaining to the offers being evaluated.” AFARS 5115.101.

8. The GAO reviews source selection decisions for reasonableness, consistency with the RFP's evaluation criteria, and adequacy of supporting documentation. See AIU North America, Inc., B-283743.2, Feb. 16, 2000, 2000 CPD ¶39; Cortland Memorial Hospital, B-286890, Mar. 5, 2001, 2001 CPD ¶ 48 and Wackenhut Servs, Inc., B-286037; B-286037.2, Nov. 14, 2000, 2001 CPD ¶ 114 (emphasizing the importance of contemporaneous documentation). The SSA has considerable discretion. See Calspan Corp., B-258441, Jan. 19, 1995, 95-1 CPD ¶ 28.
- a. The SSA may consider slightly different scores a tie and award to the lower cost offeror. See Tecom, Inc., B-257947, Nov. 29, 1994, 94-2 CPD ¶ 212; Duke/Jones Hanford, Inc., B-249637.10, July 13, 1993, 93-2 CPD ¶ 26.
  - b. Conversely, the SSA may consider slightly different scores to represent a significant difference justifying the greater price. See Macon Apparel Corp., B-253008, Aug. 11, 1993, 93-2 CPD ¶ 93; Suncoast Assoc., Inc., B-265920, Dec. 7, 1995, 95-2 CPD ¶ 268.
  - c. In one case, a SSA's decision to award to a substantially lower scored offeror, whose cost was only slightly lower, was not adequately justified. TRW, Inc., B-234558, June 21, 1989, 68 Comp. Gen. 512, 89-1 CPD ¶ 584. However, after the SSA's reconsideration, the same outcome was adequately supported. TRW, Inc., B-234558.2, Dec. 18, 1989, 89-2 CPD ¶ 560.
  - d. Reliance on the scores of evaluators alone, without looking at strengths and weaknesses of each proposal, may be unreasonable. See SDA, Inc., B-248528.2, Apr. 14, 1993, 93-1 CPD ¶ 320.
  - e. SSA's may disagree with the analyses of and conclusions reached by evaluators, however, they must be reasonable when doing so and adequately support their source selection decision. DynCorp Int'l LLC, B-289863.2, May 13, 2002, 2002 CPD ¶ 83 (finding no support in the record for the SSA to question the weaknesses in the awardee's proposal as identified by the evaluation teams).
9. The standard of review for the Court of Federal Claims is whether the agency's decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(A)(2); Cubic Applications, Inc. v. U.S., 37 Fed. Cl. 339, 342 (1997).

N. Debriefings. 10 U.S.C. § 2305(b)(5); 41 U.S.C. § 253b(e); FAR 15.505-506.

1. Notices to Unsuccessful Offerors. FAR 15.503.

a. Preaward Notices of Exclusion from the Competitive Range.

(1) The contracting officer must provide prompt, written notice to offerors excluded or eliminated from the competitive range, stating the basis for the determination and that revisions will not be considered. FAR 15.503(a)(1).

(2) Small Business Set-Asides. FAR 15.503(a)(2).

(a) The contracting officer must provide written notice to the unsuccessful offerors before award.

(b) The notice must include the name and address of the apparently successful offeror and state that:

(i) The government will not consider additional proposal revisions; and

(ii) No response is required unless the offeror intends to challenge the small business size status of the apparently successful offeror.

b. Postaward Notices. FAR 15.503(b).

(1) Within 3 days after the contract award date, the contracting officer must notify in writing unsuccessful offerors.

- (2) The notice must include the number of offerors solicited, the number of proposals received, the names and addresses of the awardee(s), the awarded items, quantities, unit prices,<sup>8</sup> and a general description of why the unsuccessful offeror's proposal was not accepted.

## 2. Debriefings.

### a. Preaward Debriefings. FAR 15.505.

- (1) An offeror excluded from the competitive range (or otherwise eliminated from consideration for award) may request a preaward debriefing.
  - (a) An offeror must submit a written request for a debriefing within 3 days of the date it receives its notice of exclusion.
  - (b) If the offeror does not meet this deadline, the offeror is not entitled to either a preaward or postaward debriefing.
- (2) The contracting officer must "make every effort" to conduct the preaward debriefing as soon as practicable.
  - (a) The offeror may request the contracting officer to delay the debriefing until after contract award.
  - (b) The contracting officer may delay the debriefing until after contract award if the contracting officer concludes that delaying the debriefing is in the best interests of the government. See Global Eng'g. & Const. Joint Venture, B-275999, Feb. 19, 1997, 97-1 CPD ¶ 77 (declining to review the contracting officer's determination).

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<sup>8</sup> As a result of the decision in *MCI WorldCom v. GSA*, 163 F. Supp. 2d 28 (D.C. 2001), which addressed the treatment of unit prices under exemption 4 of the Freedom of Information Act, FAR 15.503(b)(1)(iv) may be revised to clarify the release of unit prices. See Federal Acquisition Regulation; Debriefing – Competitive Acquisitions, 68 Fed. Reg. 5778 (Feb. 4, 2003).

- (3) At a minimum, preaward debriefings must include:
  - (a) The agency's evaluation of significant elements of the offeror's proposal;
  - (b) A summary of the agency's rationale for excluding the offeror; and
  - (c) Reasonable responses to relevant questions.
- (4) Preaward debriefings must not include:
  - (a) The number of offerors;
  - (b) The identity of other offerors;
  - (c) The content of other offerors' proposals;
  - (d) The ranking of other offerors;
  - (e) The evaluation of other offerors; or
  - (f) Any of the information prohibited in FAR 15.506(e).
- (5) A summary of the debriefing is to be included in the contract file.

b. Postaward Debriefings. FAR 15.506.

- (1) An unsuccessful offeror may request a postaward debriefing.



- (a) An offeror must submit a written request for a debriefing within 3 days of the date it receives its postaward notice.
  - (b) The agency may accommodate untimely requests; however, the agency decision to do so does not automatically extend the deadlines for filing protests.
- (2) The contracting officer must conduct the postaward debriefing within 5 days of the date the agency receives a timely request “to the maximum extent practicable.”
- (3) At a minimum, postaward debriefings must include:
  - (a) The agency’s evaluation of the significant weak or deficient factors in the offeror’s proposal;
  - (b) The overall evaluated cost or price,<sup>9</sup> and technical rating, if applicable, of the awardee and the debriefed offeror, and past performance information on the debriefed offeror;
  - (c) The overall rankings of all of the offerors;
  - (d) A summary of the rationale for the award decision;
  - (e) The make and model number of any commercial item(s) the successful offeror will deliver; and
  - (f) Reasonable responses to relevant questions.
- (4) Postaward debriefings must not include:

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<sup>9</sup> As a result of the decision in *MCI WorldCom v. GSA*, 163 F. Supp. 2d 28 (D.C. 2001), which addressed the treatment of unit prices under exemption 4 of the Freedom of Information Act, FAR 15.506(d) may be revised to clarify the release of unit prices. See Federal Acquisition Regulation; Debriefing – Competitive Acquisitions, 68 Fed. Reg. 5778 (Feb. 4, 2003).

- (a) A point-by-point comparison of the debriefed offeror's proposal with any other offeror's proposal; and
  - (b) Any information prohibited from disclosure under FAR 24.202 or exempt from release under the Freedom of Information Act, including the names of individuals providing past performance information.
- (5) A summary of the debriefing must be included in the contract file.
- (6) General Considerations. The contracting officer should:
  - (a) Tailor debriefings to emphasize the fairness of the source selection procedures;
  - (b) Point out deficiencies that the contracting officer discussed but the offeror failed to correct;
  - (c) Point out areas for improvement of future proposals.

#### **IV. CONCLUSION.**



## **CHAPTER 8**

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## **CHAPTER 8**

### **SIMPLIFIED ACQUISITION PROCEDURES**

#### **I. INTRODUCTION.** Following this block of instruction, students should:

- A. Understand that simplified acquisition procedures streamline the acquisition process and result in substantial savings of time and money to the Government.
- B. Understand how simplified acquisition procedures differ from other acquisition methods.
- C. Understand the various simplified acquisitions methods, and the situations when each method should be used.

#### **II. REFERENCES.**

- A. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994) (hereinafter FASA).
- B. FAR Part 13.

#### **III. WHEN TO USE SIMPLIFIED ACQUISITION PROCEDURES.**

- A. Definitions.
  - 1. Simplified acquisitions are acquisitions of supplies or services in the amount of \$100,000 or less using simplified acquisition procedures. FAR 2.101.

The threshold is \$250,000 inside the US and \$1,000,000 outside the US if the head of the agency determines the acquisition for supplies or services are to be used to in support of a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack. FAR 2.101. The 2005 National Defense Authorization Act, § 822.

2. Simplified acquisition procedures are those methods prescribed in Part 13 of the FAR, Part 213 of the DFARS, and agency FAR supplements for making simplified acquisitions using imprest funds, purchase orders, credit cards, and blanket purchase agreements.
3. Micro-purchase means an acquisition of supplies or services, the aggregate amount of which does not exceed \$2,500, except that in the case of construction the limit is \$2,000. FAR 2.101. If the head of the agency determines the acquisitions of supplies or services is in support of a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical or radiological attack the micro-purchase threshold is \$25,000. FAR 2.101; FAR 13.201(g). The 2005 National Defense Authorization Act, § 822.

B. Purpose. FAR 13.002. Simplified acquisition procedures are used to:

1. Reduce administrative costs;
2. Increase opportunities for small business concerns;
3. Promote efficiency and economy in contracting.
4. Avoid unnecessary burdens for agencies and contractors.

- C. Policy. Agencies shall use simplified acquisition procedures to the maximum extent practicable for all purchases of supplies or services not exceeding the simplified acquisition threshold. FAR 13.003(a).<sup>1</sup>
1. Other Sources. Agencies need not use simplified acquisition procedures if it can meet its requirement using:
    - a. Required sources of supply under FAR part 8 (e.g., Federal Prison Industries, Committee for Purchase from People who are Blind or Severely Disabled, and Federal Supply Schedule contracts);
    - b. Existing indefinite delivery/indefinite quantity contracts; or
    - c. Other established contracts.
  2. Agencies shall not use simplified acquisition procedures to acquire supplies and services initially estimated to exceed the simplified acquisition threshold, or that will, in fact, exceed it. FAR 13.003(c).
  3. Activities shall not divide requirements that exceed the simplified acquisition threshold into multiple purchases merely to justify using simplified acquisition procedures. 10 U.S.C. § 2304(g)(2); FAR 13.003(c). See L.A. Systems v. Department of the Army, GSBGA 13472-P, 96-1 BCA ¶ 28,220 (Government improperly fragmented purchase of computer upgrades into four parts because agency knew that all four upgrades were necessary and were therefore one requirement). But see Petchem, Inc. v. United States, 99 F.Supp. 2d 50 (D.D.C. 2000) (Navy did not violate CICA by purchasing tugboat services on a piecemeal basis even though total value of the services exceeded \$100,000).

D. Commercial Item Test Program.

1. Authority.

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<sup>1</sup> In support of contingency operations defined by 10 U.S.C. § 101(a)(13) or to facilitate defense against or recovery from NBC or radiological attack, the simplified acquisition threshold increases to \$250,000 for purchase made in the U.S. or \$500,000 for purchase made outside the U.S.. Service Acquisition Reform Act of 2003, Pub. L. 108-136, § 1443; FAR 2.101; DFARS 213.000.

- a. Congress created the authority for agencies to use simplified acquisition procedures to purchase commercial item supplies and services for amounts greater than the simplified acquisition threshold but not greater than \$5,000,000. Pub.L. 104-106, § 4202(a)(1)(A) (codified at 10 U.S.C. § 2304(g)(1)(B)). FAR 13.5.
- b. Authority to issue solicitations under the test program was to expire on January 1, 2004. However, Congress extended the period of the test program until January 1, 2006. See National Defense Authorization Act for Fiscal Year 2004 § 1443, Pub. L. No. 108-136, 117 Stat. 1675 (2003). For a contingency operation or to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack against the United States, the \$5,000,000 commercial item test program threshold is 10,000,000. See National Defense Authorization Act, 2004, Pub. L. No. 108-136, 117 Stat. 1675 (2003).

2. Use.

- a. For the period of the test, contracting activities are to use simplified acquisition procedures to the maximum extent practicable. FAR 13.500(b).
- b. Congress created this authority to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors. 10 U.S.C. § 2304(g)(1). Therefore, agencies should take advantage of the simplified process. See American Eurocopter Corporation, B-283700, Dec. 16, 1999, 1999 U.S. Comp. Gen. LEXIS 222 (agency used authority of FAR 13.5 to purchase Bell Helicopter).

3. Special Documentation Requirements. FAR 13.501.

- a. Sole source acquisitions. Acquisitions conducted under simplified acquisition procedures are exempt from the requirements in FAR Part 6 (Competition). However, contracting officers shall not conduct sole source acquisitions, as defined in FAR 6.003, unless the need to do so is justified in writing and approved at the levels specified in FAR 13.501.



- (1) For a proposed contract exceeding \$100,000 but not exceeding \$500,000, the contracting officer's certification that the justification is accurate and complete to the best of the contracting officer's knowledge and belief will serve as approval, unless a higher approval level is established in agency procedures.
- (2) For a proposed contract exceeding \$500,000, the approval authority is the competition advocate for the procuring activity, the head of the procuring activity, or a designee who is a general or flag officer or a civilian in the grade of GS-16 or above. This authority is not delegable further.

b. Contract file documentation. The contract file shall include:

- (1) A brief written description of the procedures used in awarding the contract, including the fact that the test procedures in FAR 13.5 were used;
- (2) The number of offers received;
- (3) An explanation, tailored to the size and complexity of the acquisition, of the basis for the contract award decision; and
- (4) Any approved justification to conduct a sole-source acquisition.

#### **IV. SIMPLIFIED ACQUISITION PROCEDURES.**

A. Small Business Set-Aside Requirement. FAR 13.003(b).

1. Any acquisition for supplies or services that has an anticipated dollar value exceeding \$2,500, but not over \$100,000, is automatically reserved for small business concerns.<sup>2</sup> FAR 13.003(b)(1); FAR 19.502-2.

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<sup>2</sup> Contracting offices should maintain source lists of small business concerns to ensure that small business concerns are given the maximum practicable opportunity to respond to simplified acquisition solicitations. FAR 13.102.

2. Exceptions. The set-aside requirement does not apply when:
  - a. There is no reasonable expectation of obtaining quotations from two or more responsible small business concerns that are competitive in terms of market prices, quality, or delivery. FAR 19.502-2(a). See Hughes & Sons Sanitation, B-270391, Feb. 29, 1996, 96-1 CPD ¶ 119 (finding reasonable the agency's use of unrestricted procurement based on unreasonably high quotes received from small businesses for recently cancelled RFQ); But see American Imaging Servs., Inc., B-246124.2, Feb. 13, 1992, 92-1 CPD ¶ 188 (limited small business response to unrestricted solicitation for maintenance services did not justify issuance of unrestricted solicitation for significantly smaller acquisition of similar services);
  - b. Purchases occur outside the United States, its territories and possessions, Puerto Rico, and the District of Columbia. FAR 19.000(b).
3. Canceling a small business set-aside. FAR 19.502-2(a); 19.506.
  - a. If the government does not receive an acceptable (e.g. fair market price) quote from a responsible small business concern, the contracting officer shall withdraw the set-aside and complete the purchase on an unrestricted basis.
  - b. In establishing that a offered price is unreasonable, the contracting officer may consider such factors as the government estimate, the procurement history for the supplies or services in question, current market conditions, and the "courtesy bid" of an otherwise ineligible large business. Vitronics, Inc., B-237249, Jan. 16, 1990, 69 Comp. Gen. 170, 90-1 CPD ¶57.
  - c. GAO will sustain a protest concerning a set-aside withdrawal only if the contracting officer's decision had no rational basis or was based on fraud or bad faith. See Omni Elevator, B-233450.2, Mar. 7, 1989, 89-1 CPD ¶ 248 (quote 95% higher than government estimate was unreasonable); Vitronics, Inc., B-237249, Jan. 16, 1990, 69 Comp. Gen. 170, 90-1 CPD ¶57 (protester's quote that was 6% higher than large business courtesy quote was not per se unreasonable and required explanation from contracting officer).

B. Synopsis and Posting requirements. FAR 13.105.

1. Activities must meet the posting and synopsis requirements of FAR 5.101 and 5.203 (\$10,000-\$25,000, post in public place; >\$25,000, synopsis in FedBizOpps.gov).
2. When acquiring commercial items, the contracting officer can use the combined synopsis/solicitation procedure detailed at FAR 12.603.

C. Competition Requirements. FAR 13.104; FAR 13.106-1.

1. Competition standard.
  - a. The Competition in Contracting Act of 1984 (CICA) exempts simplified acquisition procedures from the requirement that agencies obtain full and open competition. 10 U.S.C. § 2304(g)(1); 41 U.S.C. § 253(a)(1)(A).
  - b. For simplified acquisitions, CICA requires only that agencies obtain competition to the "maximum extent practicable." 10 U.S.C. § 2304(g)(3); 41 U.S.C. §§ 253(a)(1)(A), 259(c); FAR 13.104.
2. Defining "maximum extent practicable."
  - a. Agency must make reasonable efforts, consistent with efficiency and economy, to give responsible sources the opportunity to compete. Gateway Cable Co., B-223157, Sep. 22, 1986, 65 Comp. Gen. 854, 86-2 CPD ¶ 333.
    - (1) FAR 13.104 no longer contains the provision that solicitation of three or more vendors is sufficient.
    - (2) If not using FACNET or the single government-wide point of entry, competition requirements ordinarily can be obtained by soliciting quotes from sources within the local trade area. FAR 13.104(b).

- (3) Vendors who ask should be afforded a reasonable opportunity to compete. An agency does not satisfy its requirement to obtain competition to the maximum extent practicable where it fails to solicit other responsible sources who request the opportunity to compete. Gateway Cable Co., B-223157, Sep. 22, 1986, 65 Comp. Gen. 854, 86-2 CPD ¶ 333 (agency failed to solicit protester who had called contracting officer 19 times).
  - (4) An agency's failure to solicit an incumbent is not in itself a violation of the requirement to promote competition. Rather, the determinative question where an agency has deliberately excluded a firm which expressed an interest in competing is whether the agency acted reasonably. See SF & Wellness, B-272313, Sep. 23, 1996, 96-2 CPD ¶ 122 (protest denied where contract specialist left message on incumbent's answering machine); Bosco Contracting, Inc., B-270366, Mar. 4, 1996, 96-1 CPD ¶ 140 (protest sustained where decision not to solicit incumbent was based on alleged past performance problems that were not factually supported).
- b. An agency should include restrictive provisions, such as specifying a particular manufacturer's product, only to the extent necessary to satisfy the agency's needs. See American Eurocopter Corporation, B-283700, Dec. 16, 1999, 1999 U.S. Comp. Gen. LEXIS 222 (finding reasonable the solicitation for a Bell Helicopter model 407); Delta International, Inc., B-284364.2, May 11, 2000, 00-1 CPD ¶ 78 (agency could not justify how only one type of x-ray system would meet its needs).
- c. Sole source.
  - (1) An agency may limit an RFQ to a single source if only one source is reasonably available (e.g., urgency, exclusive licensing agreements, or industrial mobilization). FAR 13.106-1(b).

- (2) Agencies must furnish potential offerors a reasonable opportunity to respond to the agency's notice of intent to award on a sole source basis. See Jack Faucett Associates, Inc., B-279347, June 3, 1998, 1998 U.S. Comp. Gen. LEXIS 215 (unreasonable to issue purchase order one day after providing FACNET notice of intent to sole-source award).

d. Purchases of \$2,500 or less ("micro-purchases"). FAR 13.202.

- (1) To the extent practicable, micro-purchases shall be distributed equitably among qualified suppliers. FAR 13.202(a)(1). See Grimm's Orthopedic Supply & Repair, B-231578, Sept. 19, 1988, 88-2 CPD ¶ 258 (agency properly distributed orthopedic business based on a rotation list).
- (2) Competition is not required for a micro-purchase if the contracting officer determines that the price is reasonable. FAR 13.202(a)(2); Michael Ritschard, B-276820, Jul. 28, 1997, 97-2 CPD ¶ 32 (contracting officer properly sought quotes from two of five known sources, and made award).
- (3) As of 31 July 2000, DoD requires the use of the government credit card for all purchases at or below the micropurchase threshold. 65 Fed. Reg. 46,625 (2000).

**V. SIMPLIFIED ACQUISITION METHODS.** "Authorized individuals"<sup>3</sup> shall use the simplified acquisition method that is most suitable, efficient, and economical. FAR 13.003(g).

A. Purchase Orders. FAR 13.302.

1. Definition. A purchase order is a government offer to buy certain supplies, services, or construction, from commercial sources, upon specified terms and conditions. FAR 13.004. A purchase order is different than a delivery order, which is placed against an established contract.

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<sup>3</sup> An "authorized individual" is someone who has been granted authority under agency procedures to acquire supplies and services under simplified acquisition procedures. FAR 13.001.

2. Considerations for soliciting competition.

- a. Contracting officers shall promote competition to the maximum extent practicable to obtain supplies and services from the source whose offer is most advantageous to the government considering the administrative cost of the purchase. FAR 13.104.
- b. Contracting officers shall not:
  - (1) solicit quotations based on personal preference; or
  - (2) restrict solicitation to suppliers of well-known and widely distributed makes or brands. FAR 13.104(a).
- c. If not providing notice of proposed contract action through the single, government-wide point of entry, maximum practicable competition ordinarily can be obtained by soliciting quotes or offers from sources within the local trade area. FAR 13.104(b).
- d. Before requesting quotes, FAR 13.106-1(a) requires the contracting officer to consider:
  - (1) The nature of the article or service to be purchased and whether it is highly competitive and readily available in several makes or brands, or is relatively noncompetitive;
  - (2) Information obtained in making recent purchases of the same or similar item;
  - (3) The urgency of the proposed purchase;
  - (4) The dollar value of the proposed purchase; and
  - (5) Past experience concerning specific dealers' prices.

- e. Basis of Award. Regardless of the method used to solicit quotes, the contracting officer shall notify potential quoters of the basis on which award will be made (price alone or price and other factors, e.g., past performance and quality). Contracting officers are encouraged to use best value. FAR 13.106-1(a)(2).

3. Methods of soliciting quotes.

a. Oral. FAR 13.106-1(c)

- (1) Contracting officers shall solicit quotes orally to the maximum extent practicable, if:

- (a) The acquisition does not exceed the simplified acquisition threshold;
- (b) It is more efficient than soliciting through available electronic commerce alternatives; and
- (c) Notice is not required under FAR 5.101.

- (2) It may not be practicable for actions exceeding \$25,000 unless covered by an exception in FAR 5.202.

b. Electronic.

- (1) Agencies shall use electronic commerce when practicable and cost-effective. FAR 13.003(f); FAR Subpart 4.5.
- (2) Drawings and lengthy specifications can be provided off-line in hard copy or through other appropriate means. FAR 13.003(f).

c. Written. FAR 13.106-1(d).

- (1) Contracting officers shall issue a written solicitation for construction requirements exceeding \$2,000.

- (2) If obtaining electronic or oral quotations is uneconomical, contracting officers should issue paper solicitations for contract actions likely to exceed \$25,000.

4. Legal effect of quotes.

- a. A quotation is not an offer, and can't be accepted by the government to form a binding contract. FAR 13.004(a); Eastman Kodak Co., B-271009, May 8, 1976, 96-1 CPD 215.
- b. Offer. An order is a government offer to buy supplies or services under specified terms and conditions. A supplier creates a contract when it accepts the government's order. C&M Mach. Prods., Inc., ASBCA No. 39635, 90-2 BCA ¶ 22,787 (bidder's response to purchase order proposing a new price was a counteroffer that the government could accept or reject).
- c. Acceptance. FAR 13.004(b). A contractor may accept a government order by:
  - (1) notifying the government, preferably in writing;
  - (2) furnishing supplies or services; or
  - (3) proceeding with work to the point where substantial performance has occurred.<sup>4</sup>

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<sup>4</sup> "Substantial performance" is a phrase used in construction or service contracts, which is synonymous with "substantial completion." It is defined as performance short of full performance, but nevertheless good faith performance in compliance with the contract except for minor deviations. RALPH C. NASH, ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK, at 497 (2d ed. 1998).



5. Receipt of quotes.

- a. Contracting officers shall establish deadlines for the submission of responses to solicitations that afford suppliers a reasonable period of time to respond. FAR 13.003(h)(2). See American Artisan Productions, Inc., B-281409, Dec. 21, 1998, 98-2 CPD ¶ 155 (finding fifteen day response period reasonable). But See KPMG Consulting, B-290716, B-290716.2, Sept. 23, 2002, 2002 CPD ¶ 196 (agency may, if not prohibited by solicitation, consider a late quote).
- b. Contracting officers shall consider all quotations that are timely received. FAR 13.003(h)(3).
  - (1) The Government can solicit and receive new quotations any time before contract formation, unless a request for quotations establishes a firm closing date. Technology Advancement Group, B-238273, May 1, 1990, 90-1 CPD ¶ 439; ATF Constr. Co., Inc., B-260829, July 18, 1995, 95-2 CPD ¶ 29.
  - (2) When a purchase order has been issued prior to receipt of a quote, the agency's decision not to consider the quote is unobjectionable. Comspace Corp. B-274037, Nov. 14, 1996, 96-2 CPD ¶ 186.

6. Evaluations.

- a. Evaluations must be conducted based fairly and in accordance with the terms of the solicitation. Kathryn Huddleston & Assocs., Ltd., B-289453, Mar. 11, 2002, 2002 CPD ¶ 167; Finlen Complex Inc., B-288280, Oct. 10, 2001, 2001 CPD ¶ 167.
- b. The contracting officer has broad discretion in fashioning suitable evaluation criteria. At the contracting officer's discretion, one or more, but not necessarily all, of the evaluation procedures in FAR Parts 14 or 15 may be used. FAR 13.106-2(b). See Cromartie and Breakfield, B-279859, Jul. 27, 1998, 1998 U.S. Comp. Gen. LEXIS 266 (upholding rejection of quote using Part 14 procedures for suspected mistake).

- c. If a solicitation contains no evaluation factors other than price, price is the sole evaluation criterion. United Marine International, Inc., B-281512, Feb. 22, 1999, 99-1 CPD ¶ 44.
- d. If using price and other factors, ensure quotes can be evaluated in an efficient and minimally burdensome fashion. Formal evaluation plans, discussions, and scoring of quotes are not required. Contracting officers may conduct comparative evaluations of offers. FAR 13.106-2(b)(2); See United Marine International LLC, B-281512, Feb. 22, 1999, 99-1 CPD ¶ 44 (discussions not required).
- e. Evaluation of other factors, such as past performance:
  - (1) Does not require the creation or existence of a formal data base; and
  - (2) May be based on information such as the contracting officer's knowledge of, and previous experience with, the supply or service being acquired, customer surveys, or other reasonable basis. FAR 13.106-2(b)(2); See MAC's General Contractor, B-276755, July 24, 1997, 97-2 CPD ¶ 29 (reasonable to use protester's default termination under a prior contract as basis for selecting a higher quote for award); Environmental Tectonics Corp., B-280573.2, Dec. 1, 1998, 98-2 CPD ¶ 140 (Navy properly considered evidence of past performance from sources not listed in vendor's quotation).

7. Award and Documentation. FAR 13.106-3

- a. Price Reasonableness. The contracting officer shall determine that a price is fair and reasonable before making award.
- b. Documentation.
  - (1) Documentation should be kept to a minimum. FAR 13.106-3(b) provides examples of the types of information that should be recorded.

- (2) The contracting officer must include a statement in the contract file supporting the award decision if other than price-related factors were considered in selecting the supplier. FAR 13.106-3(b)(3)(ii); See Universal Building Maintenance, Inc., B-282456, Jul. 15, 1999, 1999 U.S. Comp. Gen. LEXIS 132 (protest sustained because contracting officer failed to document award selection, and FAR Parts 12 and 13 required some explanation of the award decision).
  - c. Notice to unsuccessful vendors shall be provided if requested. FAR 13.106-3(c) and (d).
8. Termination or cancellation of purchase orders. FAR 13.302-4.
- a. The government may withdraw, amend, or cancel an order at any time before acceptance. See Alsace Industrial, Inc., ASBCA No. 51708, 99-1 BCA ¶ 30,220 (holding that the government's offer under the unilateral purchase order lapsed by its own terms when Alsace failed to deliver on time); Master Research & Mfg., Inc., ASBCA No. 46341, 94-2 BCA ¶ 26,747.
  - b. If the contractor has not accepted a purchase order in writing, the contracting officer may notify the contractor in writing, and:
    - (1) Cancel the purchase order, if the contractor accepts the cancellation; or
    - (2) Process the termination action if the contractor does not accept the cancellation or claims that it incurred costs as a result of beginning performance. But see Rex Sys., Inc., ASBCA No. 45301, 93-3 BCA ¶ 26,065 (contractor's substantial performance only required government to keep its unilateral purchase order offer open until the delivery date, after which the government could cancel when goods were not timely delivered).
  - c. Once the contractor accepts a purchase order in writing, the government cannot cancel it; the contracting officer must terminate the contract in accordance with:

- (1) FAR 12.403(d) and 52.212-4(l) for commercial items; or
- (2) FAR Part 49 and 52.213-4 for other than commercial items.

B. Blanket Purchase Agreements. FAR 13.303.

1. Definition.

- a. A blanket purchase agreement (BPA) is a simplified method of filling anticipated repetitive needs for supplies or services by establishing “charge accounts” with qualified sources of supply. FAR 13.303-1(a).
- b. A BPA is not a contract. The actual contract is not formed until an order is issued or the basic agreement is incorporated into a new contract by reference. Modern Technology Corp. v. United States, 24 Cl.Ct. 360 (1991)(Judge Bruggink provides comprehensive analysis of legal effect of a BPA in granting summary judgment to Postal Service in breach claim).
- c. BPAs may be issued without a commitment of funds; however, a commitment and an obligation of funds must separately support each order placed under a BPA.
- d. Blanket purchase agreements should include the maximum possible discounts, allow for adequate documentation of individual transactions, and provide for periodic billing. FAR 13.303-2(d).

2. Limits on BPA usage.

- a. The use of a BPA does not justify purchasing from only one source or avoiding small business set-asides. FAR 13.303-5(c).
- b. If there is an insufficient number of BPAs to ensure maximum practicable competition for a particular purchase, the contracting officer must solicit from other sources or create additional BPAs. FAR 13.303-5(d).

- c. A BPA may be properly established when:
  - (1) There are a wide variety of items in a broad class of supplies and services that are generally purchased, but the exact items, quantities, and delivery requirements are not known in advance and may vary considerably.
  - (2) There is a need to provide commercial sources of supply for one or more offices or projects that do not have or need authority to purchase otherwise.
  - (3) Use of BPAs would avoid the writing of numerous purchase orders.
  - (4) There is no existing requirements contract for the same supply or service that the contracting activity is legally obligated to use.

3. Establishment of BPAs. FAR 13.303-2(b-c).

- a. After determining a BPA to be advantageous, contracting officers shall:
  - (1) Establish the parameters of the BPA. Will the agreement be limited to individually identified items, or will it merely identify broad commodity groups or classes of goods and services?
  - (2) Consider quality suppliers who have provided numerous purchases at or below the simplified acquisition threshold.
- b. BPAs may be established with:
  - (1) More than one supplier for goods and services of the same type to provide maximum practicable competition.

- (2) A single source from which numerous individual purchases at or below the simplified acquisition threshold will likely be made. This may be a useful tool in a contingency operation where vendor choices may be limited, and contract personnel can negotiate the terms for subsequent orders in advance of, or concurrent with, a deployment.
- (3) The FAR authorizes the creation of BPAs under the Federal Supply Schedule (FSS) “if not inconsistent with the terms of the applicable schedule contract.” FAR 13.303-2(c)(3).<sup>5</sup>
  - (a) FAR 8.404(b)(4) provides the following guidance for creating a BPA under the FSS:
    - (i) It is permitted when following the ordering provisions of FAR 8.4.
    - (ii) Ordering offices may establish BPAs to establish accounts with contractors to fill recurring requirements.
    - (iii) BPAs should address the frequency of ordering and invoicing, discounts, and delivery locations and times.
  - (b) GSA provides a sample BPA format for agencies to use.
  - (c) Benefits of establishing BPAs with a FSS contractor.
    - (i) It can reduce costs. Agencies can seek further price reductions from the FSS contract price.

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<sup>5</sup> All schedule contracts contain BPA provisions. FAR 8.404(b)(4).

- (ii) It can streamline the ordering process. A study of the FSS process revealed that it was faster to place an order against a BPA than it was to place an order under a FSS.
- (iii) Purchases against BPAs established under GSA multiple award schedule contracts can exceed the simplified acquisition threshold and the \$5,000,000 limit of FAR 13.5. FAR 13.303-5(b).

4. Review of BPAs. The contracting officer who entered into the BPA shall (FAR 13.303-6):

- a. ensure it is reviewed at least annually and updated if necessary;
- b. maintain awareness in market conditions, sources of supply, and other pertinent factors that warrant new arrangements or modifications of existing arrangements; and
- c. review a sufficient random sample of orders at least annually to make sure authorized procedures are being followed.

C. Imprest Funds. FAR Part 13.305; DFARS 213.305.

- 1. Definition. An imprest fund is a “cash fund of a fixed amount established by an advance of funds, without charge to an appropriation, from an agency finance or disbursing officer to a duly appointed cashier, for disbursement as needed from time to time in making payment in cash for relatively small amounts.” FAR 13.001.
- 2. DOD Policy. DOD does not support the use of cash payments from imprest funds. This policy is based, in part, on the mandatory electronic funds transfer requirements of the Debt Collection Improvement Act of 1996 (Pub. L. 104-134). DFARS 213.305-1(1).
- 3. DOD Use.

- a. Use of imprest funds must comply with the conditions stated in the DOD Financial Management Regulation<sup>6</sup> and the Treasury Financial Manual.<sup>7</sup>
- b. Imprest funds can be used without further approval for:
  - (1) Overseas transactions at or below the micro-purchase threshold in support of a contingency operation as defined in 10 U.S.C. § 101(a)(13) or a humanitarian or peacekeeping operation as defined in 10 U.S.C. § 2302(7); and
  - (2) Classified transactions. 213.305-3(d)(ii).
- c. On a very limited basis, installation commanders and commanders of other activities with contracting authority may be granted authority to establish imprest funds. DFARS 213.305-1(2). Approval is required from the Director for Financial Commerce, Office of the Deputy Chief Financial Officer, Office of the Under Secretary of Defense (Comptroller). DFARS 213.305-3(d)(I)(B).

D. Government-wide Commercial Purchase Card. FAR 13.301.

- 1. Purpose. The purchase card is funded with appropriated funds. The government-wide commercial purchase card is authorized for use in making and/or paying for purchases of supplies, services, or construction.<sup>8</sup> DOD contracting officers must use the card for all acquisitions at or below \$2,500. DOD FMR Vol.5, ¶ 0210.
- 2. Implementation.
  - a. Agencies using government-wide commercial purchase cards shall establish procedures for use and control of the card. FAR 13.301(b). Procedures and purchasing authority differ among agencies.

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<sup>6</sup> DOD 7000.14-R, Volume 5, Disbursing Policy and Procedures.

<sup>7</sup> Part 4, Chapter 3000, section 3020.

<sup>8</sup> DOD's purchase card limit is \$200,000 for contingency, humanitarian, or peacekeeping operations. DFARS 213.301(2); 66 Fed. Reg. 55,123 (Nov. 1, 2001). However, the AFARS currently retains a \$2,500 limit for most purchases. AFARS 5113.270.



b. Agencies must have effective training programs in place to avoid card abuses. For example, cardholders may be bypassing required sources of supply. See Memorandum, Administrator of the Office of Federal Procurement Policy, to Agency Senior Procurement executives, subject: Applicability of the Javits-Wagner-O'Day Program for Micropurchases (Feb. 16, 1999)(clarifies that JWOD's status as a priority source under FAR 8.7 applies to micropurchases).

c. Do's and Don'ts. *See* [www-benning.army.mil/DOC/IMPAC.htm](http://www-benning.army.mil/DOC/IMPAC.htm)

3. Uses. FAR 13.301(c).

a. To make micro-purchases.

b. To place task or delivery orders (if authorized in the basic contract, basic ordering agreement, or BPA);

c. To make payments when the contractor agrees to accept payment by the card.

d. Do not give the card to contractors. AFI 64-117, AIR FORCE GOVERNMENT PURCHASE CARD PROGRAM; Memorandum, Secretary of the Air Force (Associate Deputy Assistant Secretary-Contracting & Acquisition), to ALMAJCOM, subject: Contractor Use of the Government-wide Purchase Card (28 July 2000); FAR 13.301(a); FAR 1.603-3.

3. "Control Weaknesses". Several GAO reports and a DOD IG Audit Report have identified control weaknesses that leave agencies vulnerable to fraud and abuse. DOD IG Audit Report, Controls Over the DoD Purchase Card Program, Rept. No. D-2002-075, 29 March 2002; GAO Rept. No. 02-676T, Government Purchase Cards: Control Weaknesses Expose Agencies to Fraud and Abuse, (May 1, 2002); GAO Rept. No. 02-506T, Purchase Cards: Continued Control Weaknesses Leave Two Navy Units vulnerable to Fraud and Abuse, March 13, 2002. Problem areas include:

a. Lack of Training (for cardholders and approving officials).

b. Selecting Cardholders and Assigning Approving Officials.

- c. Inadequate Review and Approval.
- d. Setting Spending Limits. Splitting purchases to avoid spending limits.
- e. Purchases made after accounts closed.

#### 4. Practical Pointers

a. Training, Training, Training. Sample Training Slides and Web-based training:

- (1) AMC Purchase Card Tutorial:  
<http://www.amc.army.mil/amc/rda/rda-ap/impactut.html>
- (2) Ft. Lewis DOC: <http://www.lewis.army.mil/doc/>

- b. Issue cards only to employees who need them.
- c. Authorizing officials should be responsible for 5-7 cardholders.
- d. Authorizing official should not be a cardholder.
- e. Watch single purchase and monthly spending limits.
- f. Closely monitor use of convenience checks.

E. Electronic Commerce. An exploding growth area. More than 1,300 federal “e-government” initiatives. *See* [www.govexec.com/dailyfed/0101/012401j2plain.htm](http://www.govexec.com/dailyfed/0101/012401j2plain.htm). In December 2002, the President established an e-government office within the White House Office of Management and Budget. *See* [www.govexec.com/dailyfed/1202/121702td1.htm](http://www.govexec.com/dailyfed/1202/121702td1.htm).

- 1. Electronic Signatures in federal procurement. 65 Fed. Reg. 65,698 (Nov. 1, 2000) (to be codified at 48 C.F.R. pts. 2 and 4).

2. Effective 1 October 2001, mandatory single point of electronic access to government-wide procurement opportunities. *See* [www.fedbizopps.gov](http://www.fedbizopps.gov).
3. Treasury Department policy on electronic transactions in federal payments and collections. *See* [www.contracts.ogc.doc.gov/cld/ecom/66fr394.htm](http://www.contracts.ogc.doc.gov/cld/ecom/66fr394.htm).
4. Agencies can use “certified e-mail” from U.S. Postal Service. *See* [www.fedtechnology.com](http://www.fedtechnology.com) (Jan. 23, 2001 issue).
5. GSA on-line property auction. *See* [www.govexec.com/dailyfed/0101/011801h1.htm](http://www.govexec.com/dailyfed/0101/011801h1.htm).
6. Reverse auctions. Prospective contractors bid down the price in real time to compete to provide the product sought by the government. *See* Thomas F. Burke, *Online Reverse Auctions*, West Group Briefing Papers (Oct. 2000). Tremendous growth potential, yet no statutory or regulatory guidance. Two reported cases: Royal Hawaiian Movers, B-288653, Oct. 31, 2001, 2001 U.S. Comp. Gen. LEXIS 165; Pacific Island Movers, B-287643.2, July 19, 2001, 2001 CPD P. 126.
7. Internet failure may not excuse late delivery of contractor’s proposal. Performance Construction, Inc., B-286192, Oct. 30, 2000, 2000 CPD.¶ 180.
8. Section 508 Disabilities Initiative Takes Effect. As of June 25, 2001, government contracts awarded for electronic and information technology (EIT) must contain technology that is accessible to disabled federal employees and disabled members of the public. 66 Fed. Reg. 20,894 (Apr. 25, 2001).

## VI. CONCLUSION.

## **CHAPTER 9**

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## **CHAPTER 9**

### **COMMERCIAL ITEM ACQUISITIONS**

- I. INTRODUCTION.** Following this block of instruction, the students should:
- A. Understand the government's emphasis on purchasing commercial items.
  - B. Understand the FAR definition of a commercial item.
  - C. Understand the methods which can be used to acquire commercial items.
  - D. Understand that the acquisition of commercial items streamlines all contracting methods.
- II. REFERENCES.**
- A. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994) [hereinafter FASA].
  - B. Federal Acquisition Reform (Clinger-Cohen) Act of 1996, Pub. L. No. 104-106, §§ 4001-4402, 110 Stat. 186,642-79 (1996) [hereinafter FARA].
  - C. FAR Parts 8 and 12.
  - D. Assistant Secretary of Defense (Command, Control, Communications & Intelligence ) and Under Secretary of Defense (Acquisition, Technology & Logistics), COMMERCIAL ITEM ACQUISITIONS: CONSIDERATIONS AND LESSONS LEARNED (June 26, 2000).
  - E. DOD's Commercial Item Handbook; [www.acq.osd.mil/ar/docs/commitemhndbk-031601.doc](http://www.acq.osd.mil/ar/docs/commitemhndbk-031601.doc).

MAJ Steve Patoir  
54th Graduate Course  
Fall 2005

### **III. POLICY.**

- A. Title VIII of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355) states a preference for government acquisition of commercial items. The purchase of proven products such as commercial and non-developmental items can eliminate the need for research and development, minimize acquisition lead-time, and reduce the need for detailed design specifications or expensive product testing. S. Rep. No. 103-258, at 5 (1994), reprinted in 1994 U.S.C.C.A.N. 2561, 2566.
- B. Part 12, which falls under FAR Subchapter B - Competition and Acquisition Planning, implements the statutory preference for purchase of commercial items by prescribing policies and procedures unique to the acquisition of commercial items. The acquisition policies resemble those of the commercial marketplace.
- C. Agencies shall conduct market research to determine whether commercial items or non-developmental items are available that can meet the agency's requirements. FAR 12.101(a).
- D. Contracting officers shall use the policies of Part 12 in conjunction with the policies and procedures for solicitation, evaluation, and award prescribed under Parts 13, Simplified Acquisition Procedures; Part 14 , Sealed Bidding; and Part 15, Contracting by Negotiation. FAR 12.102(b).
- E. Required contract types. FAR 12.207. Agencies shall use firm-fixed-price (FFP) contracts or fixed price contracts with economic price adjustments (FP/EPA). Award fees and performance or delivery incentives in FFP and FP/EPA contracts permitted if based solely on factors other than cost. 68 Fed. Reg. 13,201 (Mar. 18, 2003).

### **IV. DEFINITIONS. 41 U.S.C. § 403(12); FAR PART 2.101**

- A. Commercial Item.
  - 1. FAR 2.101. Any item, other than real property, that is of a type customarily used for non-governmental purposes and that:
    - a. Has been sold, leased, or licensed to the general public; or

- b. Has been offered for sale, lease, or license to the general public. Matter of Coherent, Inc., B-270998, May 7, 1996, 96-1 CPD ¶ 214 (actual sale or license to general public not required for commercial item classification; determination of commercial item status is discretionary agency decision).
- 2. Any item that evolved from an item described in paragraph (a) of this definition through advances in technology or performance and is not yet available in the commercial marketplace, but will be available in time to satisfy the delivery requirements specified in the Government solicitation.
- 3. Any item that would satisfy a criterion expressed in paragraphs (a) or (b) of this definition but for:
  - a. Modifications of a type customarily available in the commercial marketplace. See Crescent Helicopters, B-284706 et al, May 30, 2000, 2000 CPD ¶ 90 (helicopter wildfire suppression was “commercial”).
  - b. Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements.
    - (1) “Minor” modifications means modifications that do not significantly alter the non-governmental function or essential physical characteristics of an item or component, or change the purpose of a process. Matter of Canberra Indus., Inc., B-271016, June 5, 1996, 96-1 CPD ¶ 269 (combining commercial hardware with commercial software in new configuration, never before offered, did not alter “non-governmental function or essential physical characteristics”).
    - (2) Factors to be considered in determining whether a modification is minor include the value and size of the modification, and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor.



4. A non-developmental item, if the agency determines it was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple state and local governments.

B. Commercial Services (defined as commercial items).

1. Definition. Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed. See Envirocare of Utah, Inc. v. United States, 44 Fed. Cl. 474 (1999) (holding there was no market price for radioactive waste disposal services).
2. DOD may treat procurements of certain commercial services as procurements of commercial items if the source provides similar services contemporaneously to the public under similar terms and conditions. 41 U.S.C.A. § 403(12)(E)(ii) (West Supp. 2000).
3. The National Defense Authorization Act, 2004, § 1431, authorizes commercial item treatment for a performance-based contract or a performance-based task order for the procurement of services if: (a) the contract or task order is not estimated to exceed \$25,000,000; (b) the contract or task order sets forth specifically each task to be performed and for each task defines the task in measurable, mission-related terms, identifies the specific end products or output to be achieved and contains firm, fixed prices for specific tasks to be performed or outcomes to be achieved; (c) the source of the services provides similar services to the general public under terms and conditions similar to those offered to the federal government.

- C. Commercially Available Off-the-Shelf Item.
1. Is a commercial item;
  2. Sold in substantial quantities in the commercial marketplace; and
  3. Offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace. See Chant Engineering Co., Inc., B-281521, Feb. 22, 1999, 99-1 CPD ¶ 45 ([n]ew equipment like Chant's proposed test station, which may only become commercially available as a result of the instant procurement, clearly does not satisfy the RFP requirement for commercial-off-the-shelf (existing) equipment.”).
- D. Component means any item supplied to the federal government as part of an end item or of another component.
- E. Construction as a Commercial Item. The Administrator of the Office of Federal Procurement Policy issued a July 3, 2003 memorandum indicating commercial item acquisition policies in FAR Part 12 “should rarely, if ever, be used for new construction acquisitions or non-routine alteration and repair services.” Available at [www.acqnet.gov/Notes/far12construction.doc](http://www.acqnet.gov/Notes/far12construction.doc).
- F. Non-Developmental Item.
1. Any previously developed item of supply used exclusively for governmental purposes by a federal agency, a state or local government, or a foreign government with which the United States has a mutual defense cooperation agreement;
  2. Any item described in paragraph (a) of this definition that requires only minor modification or modifications of a type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency; or

3. Any item of supply being produced that does not meet the requirements of paragraph (a) or (b) solely because the item is not yet in use. Trimble Navigation, Ltd., B-271882, August 26, 1996, 96-2 CPD ¶ 102 (award improper where awardee offered a GPS receiver that required major design and development work to meet a material requirement of the solicitation that the receiver be a NDI).

## **V. PRIORITY SOURCES FOR COMMERCIAL ITEMS.**

- A. Supplies. FAR 8.002(a)(1). Agencies shall satisfy requirements through the following sources, in descending order of authority:
  1. Agency inventories;
  2. Excess from other agencies (see FAR 8.1);
  3. Federal Prison Industries, Inc. (18 U.S.C.A. § 4124; FAR 8.6). See [www.unicor.gov](http://www.unicor.gov). FPI is now a qualified mandatory source for DOD. Contracting officers are required to conduct market research to determine whether UNICOR products are comparable to products available in the commercial market in terms of price, quality and time of delivery. If UNICOR products are not comparable, use competitive procedures to acquire the product. The contracting officer's comparability determination is unilateral but UNICOR is authorized to compete. DFARS 208.602 Agencies are required to rate FPI performance, and compare it to the private sector. Federal Acquisition Regulation; Past Performance Evaluation of Federal Prison Industries Clearances, 68 Fed. Reg. 28,905 (May 22, 2003)(to be codified at 48 C.F.R. pts.8 and 42). At or below the micro-purchase threshold, \$2,500, federal agencies may purchase products from private industry without obtaining a clearance from FPI. In addition, a clearance is not required if delivery is required within 10 days. Federal Acquisition Regulation; Increased Federal Prison Industries, Inc. Waiver Threshold, 68 Fed. Reg. 28,095 (May 22, 2003) (to be codified at 48 C.F.R. pt. 8).
  4. Committee for Purchase From People Who Are Blind or Severely Disabled (JWOD). See [www.jwod.com](http://www.jwod.com);<sup>1</sup>

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<sup>1</sup> Some JWOD products can be found on GSA's Federal Supply Schedules.

5. Government wholesale supply sources, such as stock programs of the GSA, Defense Logistics Agency (DLA), and military inventory control points;
  6. Mandatory Federal Supply Schedules (FAR 8.4). See <www.fss.gsa.gov>;
  7. Optional use Federal Supply Schedules (FAR 8.4). See <www.fss.gsa.gov>; and
  8. Commercial sources.
- B. Services. FAR 8.002(a)(2).
1. Committee for Purchase From People Who Are Blind or Severely Disabled;
  2. Mandatory Federal Supply Schedules;
  3. Optional use Federal Supply Schedules; and
  4. Federal Prison Industries, Inc. or commercial sources (including educational and non-profit institutions).

## **VI. FEDERAL SUPPLY SCHEDULES.**

- A. Background.
1. The General Services Administration (GSA) manages the FSS program pursuant to the Section 201 of the Federal Property Administrative Services Act of 1949. A FSS is also known as a multiple award schedule (MAS).

2. The Federal Supply Schedule (FSS) program provides federal agencies with a simplified process for obtaining commonly used commercial supplies and services at prices associated with volume buying. The FSS program provides over four million commercial off-the-shelf products and services, at stated prices, for given periods of time.
3. Congress recognizes the multiple award schedule (MAS) program as a full and open competition procedure if participation in the program has been open to all responsible sources and orders and contracts under the program result in the lowest overall cost alternative to the United States. 10 U.S.C. § 2302(2)(C). But see Reep, Inc., B-290665, Sep. 17, 2002, 2002 CPD ¶ 158 (to satisfy the statutory obligation of competitive acquisitions . . . “an agency is required to consider reasonably available information . . . typically by reviewing the prices of at least three schedule vendors.” The agency failed to meet its obligation by not awarding to a vendor providing the best value to the government at the lowest overall cost.)
4. Therefore, an agency need not seek further competition, synopsise the requirement, make a separate determination of fair and reasonable pricing, or consider small business set-asides in accordance with FAR 19.5 (required for procurements under the simplified acquisition threshold). FAR 8.404(a). But see Draeger Safety, Inc., B-285366, B-285366.2, Aug. 23, 2000, 2000 CPD ¶ 139 (though the government need not seek further competition when buying from the FSS, if it asks for competition among FSS vendors, it must give those vendors sufficient details about the solicitation to allow them to compete intelligently and fairly).

B. Ordering under the FSS<sup>2</sup>.

1. Agencies place orders to obtain supplies or services from a FSS contractor. When placing the order, the agency has determined that the order represents the best value and results in the lowest overall cost alternative (considering price, special features, administrative costs, etc.) to meet the government's needs. FAR 8.404(a)(ii).

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<sup>2</sup> Unfortunately, many contracting officers do not follow GSA's established procedures when using the FSS. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-01-125, NOT FOLLOWING PROCEDURES UNDERMINES BEST PRICING UNDER GSA'S SCHEDULE (Nov. 2000).

2. An agency must reasonably ensure that the selection meets its needs by considering reasonably available information about products offered under FSS contracts. Pyxis Corp., B-282469, B-282469.2, July 15, 1999, 99-2 CPD ¶ 18.
3. If an agency places an order against an expired FSS contract, it may result in an improper sole-source award. DRS Precision Echo, Inc., B-284080; B-284080.2, Feb. 14, 2000, 2000 CPD ¶ 26.
4. If an agency places an order against a FSS contract, then all items or supplies ordered must be covered by the vendor's FSS contract (no "off the schedule buys"). Symlicity Corp., B-291902, Apr. 29, 2003, 2003 CPD ¶ 89; Omniplex World Servs., Corp., B-291105, Nov. 6, 2002, 2002 CPD ¶ 199.
5. Thresholds.
  - a. At or under \$2500. Agencies can place an order with any FSS contractor. FAR 8.404(b)(1).
  - b. Above \$2500, but below the "maximum order threshold." FAR 8.404(b)(2).
    - (1) Consider reasonably available information using the "GSA Advantage!" on-line shopping service, or
    - (2) Review catalogs/pricelists of at least three schedule contractors and select the best value vendor. The agency may consider:
      - (a) Special features of the supply or service;
      - (b) Trade-in considerations;
      - (c) Probable life of the product;
      - (d) Warranties;

- (e) Maintenance availability;
    - (f) Past performance; and
    - (g) Environmental and energy efficient considerations.
  - c. Above the maximum order threshold.
    - (1) Follow same procedures as for orders above \$2500, but below the "maximum order threshold," and
    - (2) Review additional schedule contractor's catalogs/pricelists, or use "GSA Advantage!";
    - (3) Seek price reduction from best value contractor;
    - (4) Order from contractor offering best value and lowest overall cost alternative. An order can still be placed even without price reductions.
- 6. Advantages of FSS ordering.
  - a. Reduce the time of buying.
  - b. Reduce the cost of buying. Agencies can fill recurring needs while taking advantage of quantity discounts associated with government-wide purchasing.
  - c. While not protest proof, ordering from a FSS should diminish the chances of a successful protest.

- (1) The language of 10 U.S.C. § 2304c(d)<sup>3</sup> does not apply to FSS orders. Severn Companies, Inc., B-275717.2, Apr. 28, 1997, 97-1 CPD ¶ 181, at 2 n.1.
  - (2) Whether the agency satisfies a requirement through an order placed against a MAS contract/BPA or through an open market purchase from commercial sources is a matter of business judgment that the GAO will not question unless there is a clear abuse of discretion. AMRAY, Inc., B-210490, Feb. 7, 1983, 83-1 CPD ¶ 135.
  - (3) An agency may consider administrative costs in deciding whether to proceed with a MAS order, even though it knows it can satisfy requirements at a lower cost through a competitive procurement. Precise Copier Services, B-232660, Jan. 10, 1989, 89-1 CPD ¶ 25.
  - (4) The GAO will review orders to ensure the choice of a vendor is reasonable. Commercial Drapery Contractors, Inc., B-271222, June 27, 1996, 96-1 CPD ¶ 290 (protest sustained where agency's initial failure to follow proper order procedures resulted in "need" to issue order to higher priced vendor, on the basis it was now the only vendor that could meet delivery schedule).
- d. GSA awards and administers the contract (not the order). Problems with orders should be resolved directly with the contractor. Failing that, complaints concerning deficiencies can be lodged with GSA telephonically (1-800-488-3111) or electronically (through "GSA Advantage!").

## 7. Disadvantages.

- a. Must pay GSA's "service charge" (a 1% "Industrial Funding Fee," included in the vendor's quoted price). On January 1, 2004 the fee will be reduced to .075 percent.

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<sup>3</sup> "[A] protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued." See also 4 C.F.R. § 21.5(a), which provides that the administration of an existing contract is within the purview of the contracting agency, and is an invalid basis for a GAO protest. GAO will summarily dismiss a protest concerning a contract administration issue.



- b. FSS order or competitive procurement?
- (1) When an agency makes its best value determination based solely on the FSS offerings, there is no requirement that vendors receive advance notice regarding either the agency's needs or selection criteria. COMARK Federal Systems, B-278323, B-278323.2, Jan. 20, 1998, 98-1 CPD ¶ 34.
  - (2) Likewise, a proper FSS order can be placed after an agency issues an RFQ to FSS vendors for the purpose of seeking a price reduction. COMARK Federal Systems, 98-1 CPD ¶ 34, at 4 n.3.
  - (3) However, where an agency shifts the burden of selecting items on which to quote to the FSS vendors, and intends to use vendor responses as basis of evaluation, it is a competition rather than a FSS buy. The agency must then provide guidance on how the award is to be made. COMARK Federal Systems, 98-1 CPD ¶ 34 (RFQ to three FSS firms holding BPAs with the agency failed to accurately state the agency's requirements where it did not state that award was to be made on the basis of price/technical factors tradeoff).
  - (4) Allowing the contractor to deliver material of lower cost and quality does not afford vendors fair and equal treatment. See Marvin J. Perry & Associates, B-277684, Nov. 4, 1997, 97-2 CPD ¶ 128 (protest sustained where contractor substituted ash wood rather than red oak in FSS furniture buy resulted in an unfair competition).
- c. Agencies can not order "incidentals" on Federal Supply Schedule orders.

- (1) In ATA Defense Industries, Inc., 38 Fed. Cl. 489 (1997), the Court of Federal Claims ruled that “bundling” non-schedule products with schedule products violated the Competition in Contracting Act. The contract in question involved the upgrade of two target ranges at Fort Stewart, Georgia. The non-schedule items amounted to thirty-five percent of the contract value.
- (2) Prior to 1999, the GAO allowed incidental purchases of non-schedule items in appropriate circumstances. ViON Corp., B-275063.2, Feb. 4, 1997, 97-1 CPD ¶ 53 (authorizing purchase of various cables, clamps, and controller cards necessary for the operation of CPUs ordered from the schedule).
- (3) The GAO has concluded, in light of the COFC's analysis in ATA, that there is no statutory basis for the incidental test it enunciated in ViON. Agencies must comply with regulations governing purchases of non-FSS items, such as those concerning competition requirements, to justify including those items on a FSS delivery order. Pyxis Corp., B-282469, B-282469.2, July 15, 1999, 99-2 CPD ¶ 18.

## **VII. SPECIAL COMMERCIAL PROCEDURES.**

- A. Streamlined Solicitation of Commercial Items. These procedures apply whether using simplified acquisition, sealed bid, or negotiation procedures.
  1. Publication. FAR 5.203(a). A contracting officer can expedite the acquisition process when purchasing commercial items.
    - a. Whenever agencies are required to publish notice of contract actions under FAR 5.201, the contracting officer may issue a solicitation less than 15 days after publishing notice. FAR 5.203(a)(1); or
    - b. Use a combined synopsis/solicitation procedure. FAR 5.203(a)(2).

- (1) FAR 12.603 provides the procedures for the use of a combined synopsis/solicitation document. The combined synopsis/solicitation must have less than 12,000 textual characters (approximately three and one-half single spaced pages).
  - (2) The combined synopsis/solicitation is only appropriate where the solicitation is relatively simple. It is not recommended for use when lengthy addenda to the solicitation are necessary.
  - (3) Do not use the Standard Form 1449 when issuing the solicitation.
- c. Amendments to the solicitation are published in the same manner as the initial synopsis/solicitation. FAR 12.603(c)(4).
2. Response time. FAR 5.203(b).
  - a. The contracting officer shall establish a solicitation response time that affords potential offerors a reasonable opportunity to respond to commercial item acquisitions. See American Artisan Productions, Inc., B-281409, Dec. 21, 1998, 98-2 CPD ¶ 155 (finding fifteen day response period reasonable).
  - b. The contracting officer should consider the circumstances of the individual acquisition, such as its complexity, commerciality, availability, and urgency, when establishing the solicitation response time.
3. Offers. FAR 12.205.
  - a. Contracting officers should allow offerors to propose more than one product that will meet agency's needs.
  - b. If adequate, request only existing product literature from offerors in lieu of unique technical proposals.

B. Streamlined Evaluation of Offers.

1. When evaluation factors are used, the contracting officer may insert a provision substantially the same as the provision at FAR 52.212-2, Evaluation-Commercial Items. Paragraph (a) of the provision shall be tailored to the specific acquisition to describe the evaluation factors and relative importance of those factors.
  - a. For many commercial items, the criteria need not be more detailed than technical (capability of the item offered to meet the agency need), price and past performance.
    - (1) Technical capability may be evaluated by how well the proposed product meets the Government requirement instead of predetermined subfactors.
    - (2) A technical evaluation would normally include examination of such things as product literature, product samples (if requested), technical features and warranty provisions.
  - b. Past performance shall be evaluated in accordance with the procedures for simplified acquisitions or negotiated procurements, as applicable.

C. Award. Select the offer that is most advantageous to the Government based on the factors contained in the solicitation. Fully document the rationale for selection of the successful offeror including discussion of any trade-offs considered. FAR 12.602(c); Universal Building Maintenance, Inc., B-282456, July 15, 1999, 99-2 CPD § 32.

D. Reverse Auctions. Reverse auctions use the Internet to allow on-line suppliers to compete in real-time for contracts by lowering their prices until the lowest bidder prevails. Reverse auctions can further streamline the already abbreviated simplified acquisition procedures.

1. Commercial item acquisitions lend themselves to reverse auctions because technical information is not needed unless the CO deems it necessary. Even in those instances, existing product literature may suffice.

2. Commercial item acquisitions lend themselves to reverse auctions because the CO has only to ensure that an offeror's product is generally suitable for agency needs and that the offeror's past performance indicates that the offeror is a responsible source.

## **VIII. CONTRACT CLAUSES FOR COMMERCIAL ITEMS**

- A. Contracting officers are to include only those clauses that are required to implement provisions of law or executive orders applicable to commercial items, or are deemed to be consistent with customary commercial practice. FAR 12.301(a).
- B. FAR Subpart 12.5 identifies laws that: (a) are not applicable to contracts for the acquisition of commercial items; (b) are not applicable to subcontracts, at any tier, for the acquisition of a commercial item; and (c) have been amended to eliminate or modify their applicability to either contracts or subcontracts for the acquisition of commercial items.
- C. Contract Terms and Conditions, FAR 52.212-4, is incorporated in the solicitation and contract by reference. It includes terms and conditions which are, to the maximum extent practicable, consistent with customary commercial practices. FAR 12.301(b)(3).
- D. 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Items, incorporates by reference clauses required to implement provisions of law or executive orders applicable to commercial items.
- E. Tailoring of provisions and clauses.
  1. Contracting officers may, after conducting appropriate market research, tailor FAR 52.212-4 to adapt to the market conditions for a particular acquisition. FAR 12.302(a). See Smelkinson Sysco Food Services, B-281631, Mar. 15, 1999, 99-1 CPD ¶ 57 (protest sustained where agency failed to conduct market research before incorporating an "interorganizational transfers clause").
  2. Certain clauses of FAR 52-212-4 implement statutory requirements and shall not be tailored. FAR 12.302(b).

- a. Assignments.
  - b. Disputes.
  - c. Payment.
  - d. Invoice.
  - e. Other compliances.
  - f. Compliance with laws unique to Government contracts.
3. Before a contracting officer tailors a clause or includes a term or condition that is inconsistent with customary commercial practice for the acquisition, he must obtain a waiver under agency procedures. FAR 12.302(c).
- a. The request for waiver must describe the customary practice, support the need to include the inconsistent term, and include a determination that use of the customary practice is inconsistent with the government's needs.
  - b. A waiver can be requested for an individual or class of contracts for an item.
4. Tailoring shall be by addenda to the solicitation and contract.

## **IX. UNIQUE TERMS AND CONDITIONS FOR COMMERCIAL ITEMS.**

### **A. Acceptance. FAR 12.402; FAR 52.212-4.**

1. Generally, the government relies on a contractor's assurance that commercial items conform to contract requirements. The government always retains right to reject nonconforming items.

2. Other acceptance procedures may be appropriate for the acquisition of complex commercial items, or items used in critical applications. The contracting officer should include alternative inspection procedures in an addendum to SF 1449, and must examine closely the terms of any express warranty.

B. Termination.

1. FAR Clause 52.212-4, Contract Terms and Conditions - Commercial Items, permits government termination of a commercial items contract either for convenience of the government or for cause. See FAR 12.403(c)-(d).
2. This clause contains termination concepts different from the standard FAR Part 49 termination clauses.
3. Contracting officers may use FAR Part 49 as guidance to the extent Part 49 does not conflict with FAR Part 12 and the termination language in FAR 52.212-4.

C. Warranties. The government's post-award rights contained in 52.212-4 include the implied warranty of merchantability and the implied warranty of fitness. FAR 12.404.

1. Implied warranties.
  - a. Merchantability. Provides that an item is reasonably fit for the ordinary purposes for which such items are used.
  - b. Fitness. Provides that an item is fit for use for the particular purpose for which the government will use the item. The seller must know the purpose for which the government will use the item, and the government must have relied upon the contractor's skill and judgment that the item would be appropriate for that purpose. Legal counsel must be consulted prior to the government asserting a claim of breach of this warranty.
2. Express warranties.

- a. Solicitations should require offerors to offer the government at least the same warranty terms, including offers of extended warranties, offered to the general public in customary commercial practice.
- b. Solicitations may specify minimum warranty terms.

## **X. INFORMATION TECHNOLOGY.**

- A. Clinger-Cohen Act of 1996, 40 U.S.C. § 1401.
- B. FAR Part 39.
- C. Agencies can contract directly for information technology.
- D. Agencies must use “modular contracting” as much as possible. Modular contracting is the use of successive acquisitions of interoperable increments.
- E. Agencies are responsible and accountable for results.
- F. “SmallBizMall.gov” – agencies can use to buy information technology from section 8(a) small, disadvantaged businesses.
- G. In deciding whether to place an order for brand name software under a FSS contract, government does not have to first consider the unsolicited offer of an alternate software product from a vendor that does not have a FSS contract. Sales Resources Consultants, Inc., B-284943; B-284943.2, June 9, 2000, 00-1 CPD § 102.

## **XI. CONCLUSION.**



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## **CHAPTER 10**

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## **CHAPTER 10**

### **SOCIOECONOMIC POLICIES**

#### **I. INTRODUCTION.**

##### **A. Goals of the Acquisition Process.**

1. Quality Goods and Services.
2. Reasonable Price.
3. Timely Manner.

##### **B. Collateral Policies.**

1. Often no direct relationship to goals of the acquisition process.
2. Tension.
3. Debate.

#### **II. POLICY AND PROCEDURE IN SUPPORT OF SMALL BUSINESS.**

##### **A. Policy. 15 U.S.C. §§ 631-650; FAR 19.201.**

1. Place a fair proportion of acquisitions with small business concerns.
2. Promote maximum subcontracting opportunity for small businesses.

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3. Small business defined. FAR 19.001.
  - a. Independently owned and operated;
  - b. Not dominant in field; and,
  - c. Meets applicable size standards.

B. Size Determination Procedures.

1. The Small Business Administration (SBA) establishes small business size standards, which are based either on the number of employees or annual receipts. The SBA matches a size standard with a supply, service or construction classification.
2. The contracting officer adopts an appropriate product or service classification called a North American Industry Classification System (NAICS) code and includes it in the solicitation. FAR 19.102.
  - a. This classification establishes the applicable size standard for the acquisition.
  - b. Contractors may appeal the contracting officer's NAICS code selection as a matter of right to the SBA's Office of Hearings and Appeals (OHA). The appellant must exhaust the OHA appeal process before seeking judicial review in court. See 67 Fed. Reg. 47,244 (July 18, 2002).
  - c. The contracting officer need not delay bid opening or contract award pending a NAICS code appeal. See Aleman Food Serv., Inc., B-216803, Mar. 6, 1985, 85-1 CPD ¶ 277. If the SBA finds the original NAICS code improper, the contracting officer must amend the solicitation only if he receives the SBA determination before the date offers are due. See FAR 19.303(c)(5).

- d. The GAO does not review “classification” protests. Tri-Way Sec. & Escort Serv., Inc., B-238115.2, Apr. 10, 1990, 90-1 CPD ¶ 380; JC Computer Servs., Inc. v. Nuclear Regulatory Comm’n, GSBCA No. 12731-P, 94-2 BCA ¶ 26,712; Cleveland Telecommunications Corporation, B-247964, July 23, 1992, 92-2 CPD ¶ 47.

3. Small business certification. FAR 19.301.

- a. Self-certification. To be eligible for award as a small business, an offeror must certify that it is a small business at the time of the certification. Randolph Eng’g Sunglasses, B-280270, Aug. 10, 1998, 98-2 CPD ¶ 39; United Power Corp., B-239330, May 22, 1990, 90-1 CPD ¶ 494. Contracting officer may accept the self-certification unless contracting officer has information prior to award that reasonably impeaches the certification. Fiber-Lam, Inc., B-237716.2, Apr. 3, 1990, 90-1 CPD ¶ 351.
- b. SBA certification. MTB Investments, Inc., B-275696, March 17, 1997, 97-1 CPD ¶ 112; Olympus Corp., B-225875, Apr. 14, 1987, 87-1 CPD ¶ 407.
- c. If an acquisition is set-aside for small business, failure to certify status **does not** render the bid nonresponsive. Last Camp Timber, B-238250, May 10, 1990, 90-1 CPD ¶ 461; Concorde Battery Corp., B-235119, June 30, 1989, 89-2 CPD ¶ 17.
- d. Neither the FAR nor the SBA regulations require a firm to re-certify size status before an agency exercises an option where the agency awarded the original contract on a set-aside basis. See Vantex Serv. Corp., B-251102, Mar. 10, 1993, 93-1 CPD ¶ 221. *But see* CMS Info. Servs., Inc., B-290541, Aug. 7, 2002, 2002 CPD ¶ 132. (agency may properly require firms to certify their size status as of the time they submit their quotes for an indefinite delivery/indefinite quantity (IDIQ) task order).

- e. If a contractor misrepresents its status as a small business intentionally, the contract is void or voidable. C&D Constr., Inc., ASBCA No. 38661, 90-3 BCA ¶ 23,256; J.E.T.S., Inc., ASBCA No. 28642, 87-1 BCA ¶ 19,569, aff'd, J.E.T.S., Inc. v. United States, 838 F.2d 1196 (Fed. Cir. 1988). Cf. Danac, Inc., ASBCA No. 30227, 92-1 BCA ¶ 24,519. Additionally, such a misrepresentation may be a false statement under 18 U.S.C. § 1001.

4. Size status protests. FAR 19.302.

- a. An offeror, the SBA, or another interested party (includes the contracting officer) may challenge a small business certification. A protest is “timely” if received by the contracting officer within 5 business days after bid opening or after the protester receives notice of the proposed awardee’s identity in negotiated actions. A contracting officer’s challenge is always timely. 13 C.F.R. § 121.1603. Eagle Design and Mgmt., Inc., B-239833, Sept. 28, 1990, 90-2 CPD ¶ 259; United Power Corp., B-239330, May 22, 1990, 90-1 CPD ¶ 494.
  - (1) The contracting officer must forward the protest to the SBA Government Contracting Area Office and withhold award absent a finding of urgency. FAR 19.302(h)(1); Aquasis Servs., Inc., B-240841.2, June 24, 1991, 91-1 CPD ¶ 592.
  - (2) The SBA Government Contracting Area Office must rule within 10 business days or the contracting officer may proceed with award. Systems Research and Application Corp., B-270708, Apr. 15, 1996, 96-1 CPD ¶ 186; International Ordnance, Inc., B-240224, July 17, 1990, 90-2 CPD ¶ 32.
  - (3) Area Office decisions are appealable to the Office of Hearings and Appeals. If, however, an activity awards to a firm that the Area Office initially finds is “small,” the activity need not terminate the contract if the SBA reverses the determination. McCaffery & Whitener, Inc., B-250843, Feb. 23, 1993, 93-1 CPD ¶ 168; Verify, Inc., B-244401.2, Jan. 24, 1992, 92-1 CPD ¶ 107.

- b. In negotiated small business set-asides, the agency must inform each unsuccessful offeror prior to award of the name and location of the apparent successful offeror. Resource Applications, Inc., B-271079, August 12, 1996, 96-2 CPD ¶ 61; Phillips Nat'l, Inc., B-253875, Nov. 1, 1993, 93-2 CPD ¶ 252.
- c. Post-award protests generally do not apply to the current contract. FAR 19.302(j). But see Adams Indus. Servs., Inc., B-280186, Aug. 28, 1998, 98-2 CPD ¶ 56 (protester filed protest after award; however, under the circumstances of this procurement, simplified acquisition procedures did not require the agency to issue a pre-award notice to unsuccessful vendors. FAR 13.106 (c). Since the protest was filed within 5 days after the protester received notice of the issuance of a purchase order to the awardee, the protest was considered timely.).
- d. The GAO does not review size protests. McCaffery & Whitener, Inc., *supra*; Correa Enters., Inc.-Recon., B-241912.2, July 9, 1991, 91-2 CPD ¶ 35.
- e. Courts will not overrule a SBA determination unless it is arbitrary, capricious, an abuse of discretion, or not in accordance with law or regulation. STELLACOM, Inc. v. United States, 24 Cl. Ct. 213 (1991).

C. Competition Issues: Contract Bundling.

- 1. Contract bundling is the practice of combining two or more procurement requirements, provided for previously under separate contracts, into a solicitation for a single contract. 15 U.S.C. § 632(o)(2); USA Info. Sys., Inc., B-291417, Dec. 30, 2002, 2002 CPD ¶ 224..
- 2. On 26 July 2000, the SBA issued a final rule addressing contract bundling. 65 Fed. Reg. 45,831 (2000). The rule attempts to rein in bundled contracts that are too large and thus restrict competition for small businesses. Codified at 13 C.F.R. § 125.2 (2004).
- 3. Key parts of the new rule on contract bundling.



- a. Permits “teaming” among two or more small firms, who may then submit an offer on a bundled contract.
- b. Requires the agency to submit to the SBA for review any statement of work containing bundled requirements. If the SBA concludes that the bundled requirements are too large, it may appeal to the agency. *See e.g., Phoenix Scientific Corp.*, B-286817, Feb. 24, 2001, 2001 CPD ¶ 24.
- c. When the solicitation requirements are “substantial,” the agency must show that the bundling is “necessary and justified” and that it will obtain “measurably substantial benefits.”
  - (1) The final rule defines “substantial bundling” as a contract consolidation resulting in an award with an annual average value of \$10 million or more.
  - (2) An agency may find a bundled requirement “necessary and justified” if it will derive more benefit from bundling than from not bundling. *See TRS Research*, B-290644, Sept. 13, 2002, 2002 CPD ¶ 159.
  - (3) The agency must show that the benefits are “measurably substantial,” which the rule defines as cost savings, price reduction, quality improvements, and other benefits that will lead to the following:
    - (a) Benefits equivalent to 10% if the contract value (including options) is \$75 million or less; or
    - (b) Benefits equivalent to 5% or \$7.5 million, whichever is greater, if the contract value (including options) is over \$75 million.
    - (c) Reducing only administrative or personnel costs does not justify bundling unless those costs are expected to be substantial in relation to the dollar value of the contract.

- (4) The final rule on bundling does not apply to cost comparison studies conducted under OMB Circular A-76.

d. More Bundling Restrictions on the Way.

- (1) On 17 January 2002, the Office of Small and Disadvantaged Business Utilization release a benefit analysis guidebook that assists DoD acquisition teams considering contract bundling. Available at <http://www.acq.osd.mil/sadbu>.
- (2) Look for bundling rules to become stricter. See 68 Fed. Reg. 5134 (Jan. 31, 2003) (SBA proposed rules placing greater limitations on the ability to bundle requirements in a manner that make them unsuitable for small businesses).

D. Responsibility Determinations and Certificates of Competency (COCs). Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 7101, 108 Stat. 3243, 3367 [hereinafter FASA] (repealing § 804, National Defense Authorization Act, 1993, Pub. L. No. 102-484), 106 Stat. 2315, 2447 (1992); FAR Subpart 19.6.

1. The contracting officer must determine an offeror's responsibility. FAR 9.103(b).
2. If the contracting officer finds a small business nonresponsible, he must forward the matter to the SBA Contracting Area Office immediately. FAR 19.602-1(a)(2).
3. The SBA issues a COC if it finds that the offeror is responsible.
  - a. The burden is on the offeror to apply for a COC. Thomas & Sons Bldg. Contr., Inc., B-252970.2, June 22, 1993, 93-1 CPD ¶ 482.
  - b. The contracting officer may appeal a decision to issue a COC to the SBA Central Office. FAR 19.602-3; Department of the Army - Recon., B-270860, July 18, 1996, 96-2 CPD ¶ 23.

4. The contracting officer “shall” award to another offeror if the SBA does not issue a COC within 15 business days of receiving a referral. FAR 19.602-4(c); Mid-America Eng’g and Mfg., B-247146, Apr. 30, 1992, 92-1 CPD ¶ 414. Cf. Saco Defense, Inc., B-240603, Dec. 6, 1990, 90-2 CPD ¶ 462.
5. If the SBA refuses to issue a COC, the contracting officer need not refer the case back to the SBA upon presentation of new evidence by the contractor. Discount Mailers, Inc., B-259117, Mar. 7, 1995, 95-1 CPD ¶ 140.
6. Once issued, a COC is **conclusive** as to all elements of responsibility. GAO review of the COC process is limited to determining whether government officials acted in bad faith or failed to consider vital information. The Gerard Co., B-274051, Nov. 8, 1996, 96-2 CPD ¶ 177; UAV Sys., Inc., B-255281, Feb. 17, 1994, 94-1 CPD ¶ 121; J&J Maint., Inc., B-251355.2, May 7, 1993, 93-1 CPD ¶ 373; Accord Accurate Info. Sys., Inc. v. Dep’t of the Treasury, GSBICA No. 12978-P, Sept. 30, 1994, 1994 BPD ¶ 203, mot. for recon. denied, 1994 BPD ¶ 236. But see Pittman Mech. Contractors, Inc.-Recon., B-242242.2, May 31, 1991, 91-1 CPD ¶ 525;
7. The COC procedure does not apply when an agency declines to exercise an option due to responsibility-type concerns. E. Huttenbauer & Son, Inc., B-258018.3, Mar. 20, 1995, 95-1 CPD ¶ 148.
8. The COC procedure generally does not apply when the contracting officer rejects a technically unacceptable offer. See Paragon Dynamics, Inc., B-251280, Mar. 19, 1993, 93-1 CPD ¶ 248; Pais Janitorial Serv. & Supplies, Inc., B-244157, June 18, 1991, 91-1 CPD ¶ 581.
9. The COC procedure applies when an agency determines that a small business contractor is nonresponsible based solely on a pass/fail evaluation of the firm's past performance. See Phil Howry Co., B-291402.3, B-291402.4, Feb. 6, 2003. 2003 CPD ¶ 33.

E. Regular Small Business Set-Asides. FAR Subpart 19.5.

1. The decision to set aside a procurement is within the “discretion” of the agency. FAR 19.501; Espey Mfg. & Elecs. Corp., B-254738.3, Mar. 8, 1994, 94-1 CPD ¶ 180; State Mgmt. Serv., Inc., B-251715, May 3, 1993, 93-1 CPD ¶ 355; Information Ventures, B-27994, Aug. 7, 1998, 98-2 CPD ¶ 37; but see Safety Storage, Inc., B2510851, Oct.29, 1998, 98-2 BCA ¶ 102.
2. The agency must exercise its discretion reasonably and in accordance with statutory and regulatory requirements. DCT Inc., B-252479, July 1, 1993, 93-2 CPD ¶ 1; Neal R. Gross & Co., B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53; Quality Hotel Offshore, B-290046, May 31, 2002, 2002 CPD ¶ 91.
3. DFARS 219.201(d) requires small business specialist review of all acquisitions over \$10,000, including those restricted for exclusive small business participation.
4. Types of set-asides.
  - a. Total Set-Asides.
    - (1) Acquisitions over \$100,000. FAR 19.502-2(b). The contracting officer shall set-aside any acquisition over \$100,000 for small business participation when:
      - (a) The contracting officer reasonably expects to receive offers from two or more responsible small businesses, and,
      - (b) Award will be made at a fair market price.
    - (2) Acquisitions between \$2,500 and \$100,000. FAR 19.502-2(a):
      - (a) Each acquisition that has an anticipated dollar value exceeding \$2,500, but not over \$100,000, is automatically reserved for small business concerns.

- (b) Exceptions. There is no requirement to set aside if there is no reasonable expectation of receiving offers from two or more responsible small businesses that will be competitive in terms of price, quality, and delivery schedule.
- b. Partial. FAR 19.502-3; Aalco Forwarding, Inc., et. al., B-277241.16, Mar. 11, 1998, 98-1 CPD ¶ 75. The contracting officer must set aside a portion of an acquisition, except for construction, for exclusive small business participation when:
  - (1) A total set-aside is not appropriate;
  - (2) The requirement is severable into two or more economic production runs or reasonable lots;
  - (3) One or more small business concerns are expected to have the technical competence and capacity to satisfy the requirement at a fair market price; and
  - (4) The acquisition is not subject to simplified acquisition procedures.
- 5. Contractor Limitations. If the agency sets aside an acquisition, certain subcontracting and domestic end item limitations apply. FAR 52.219-14; Innovative Refrigeration Concepts, B-258655, Feb. 10, 1995, 95-1 CPD ¶ 61; Adrian Supply Co., B-257261, Sept. 15, 1994, 95-1 CPD ¶ 21; Kaysam Worldwide, Inc., B-247743, June 8, 1992, 92-1 CPD ¶ 500; Vanderbilt Shirt Co., B-237632, Feb. 16, 1990, 90-1 CPD ¶ 290.
  - a. Services. The contractor must spend at least 50% of contract costs on its own employees.
  - b. Supplies.
    - (1) A small business manufacturer must perform at least 50% of the cost of manufacturing.

- (2) A small business nonmanufacturer (i.e., a dealer) must provide a small business product unless the SBA determines that no small business in the federal market produces the item. See Fluid Power Int'l, Inc., B-278479, Dec. 10, 1997, 97-2 CPD ¶ 162.
    - (3) Both manufacturers and nonmanufacturers must provide domestically produced or manufactured items.
  - c. Construction. The contractor's employees must perform at least 15% of the cost of the contract. If special trade contractors perform construction, the threshold is 25%.
- 6. Rejecting SBA set-aside recommendations and withdrawal of set-asides. FAR 19.505, 19.506.
  - a. The contracting officer may reject a SBA recommendation or withdraw a set-aside before award. Aerostructures, Inc., B-280284, September 15, 1998, 98-2 CPD ¶ 71.
  - b. The FAR sets forth notice and appeal procedures for resolving disagreements between the agency and the SBA. If the contracting agency and the SBA disagree, the contracting agency has the final word on set-aside or withdrawal decisions.
  - c. Potential offerors also may challenge the contracting officer's decision to issue unrestricted solicitations or withdraw set-asides. American Imaging Servs., B-238969, July 19, 1990, 90-2 CPD ¶ 51.
  - d. If the activity receives **no** small business offers, the contracting officer may not award to a large business but must withdraw the solicitation and resolicit on an unrestricted basis. Western Filter Corp., B-247212, May 11, 1992, 92-1 CPD ¶ 436; CompuMed, B-242118, Jan. 8, 1991, 91-1 CPD ¶ 19; Ideal Serv., Inc., B-238927.2, Oct. 26, 1990, 90-2 CPD ¶ 335.

7. An agency is not required to set aside the reprocurement of a defaulted contract. Premier Petro-Chemical, Inc., B-244324, Aug. 27, 1991, 91-2 CPD ¶ 205.
8. Small Business Competitiveness Demonstration Program (SBCDP). FAR Subpt. 19.10. The SBCDP is designed to test the ability of small businesses to compete successfully in certain industry categories. Generally, set-asides are not required for acquisitions subject to this program.

### **III. PROGRAMS FOR SMALL DISADVANTAGED BUSINESSES.**

- A. Contracting with the SBA's "8(a)" Business Development Program. 15 U.S.C. § 637(a); 13 C.F.R. Part 124; FAR Subpart 19.8.
  1. The primary program in the federal government designed to assist small disadvantaged businesses is commonly referred to as the 8(a) program. The program derives its name from Section 8(a) of the Small Business Act. Section 8(a) authorizes the SBA to enter into contracts with other federal agencies. The SBA then subcontracts with eligible small disadvantaged businesses (SDBs). 15 U.S.C. § 637(a).
    - a. By Memorandum of Understanding (MOU), dated 6 May 1998, between DOD and the SBA, the SBA delegated its authority to DOD to enter into 8(a) prime contracts with 8(a) contractors. 63 Fed. Reg. 33,587 (1998). This MOU is no longer in effect. On 30 July 2002, DOD issued a final rule allowing it to bypass SBA and contract directly with 8(a) SDBs on behalf of the SBA. The final rule delegates only the authority to sign contracts on behalf of the SBA. The SBA remains the prime contractor on all 8(a) contracts, continues to determine eligibility of concerns for contract award, and retains appeal rights under FAR 19.810. See 67 Fed. Reg. 49255, July 30, 2002. See also DFARS 219.800(a) and FAR 19.8
    - b. Either the SBA or the contracting activity may initiate selection of a requirement or a specific contractor for an 8(a) acquisition. FAR 19.803

c. Businesses must meet the criteria set forth in 13 C.F.R. §§ 124.102 - 124.109 to be eligible under the 8(a) program. Autek Sys. Corp., 835 F. Supp. 13 (D.D.C. 1993), aff'd, 43 F.3d 712 (D.C. Cir. 1994).

(1) The firm must be owned and controlled by socially and economically disadvantaged persons. The regulations require 51% ownership and control by one or more individuals who are **both** socially and economically disadvantaged. See Software Sys. Assoc. v. Saiki, No. 92-1776 (D.D.C. June 24, 1993); SRS Technologies v. United States, No. 95-0801 (D.D.C. July 18, 1995).

(a) Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control. 13 C.F.R. § 124.103(a).

(i) There is a rebuttable presumption that members of certain designated groups are socially disadvantaged. 13 C.F.R. § 124.103(b)(1).

(ii) Individuals who are not members of designated socially disadvantaged groups must establish individual social disadvantage by a “preponderance of the evidence.” 13 C.F.R. § 124.103(c)(1). Previously, individuals not members of designated groups needed to prove social disadvantage by “clear and convincing evidence.”



- (b) Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished credit capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged. 13 C.F.R. § 124.104(a).
- (i) In considering diminished capital and credit opportunities, the SBA will consider such factors as:
  - (a) Personal income for the last two years;
  - (b) Personal net worth and the fair market value of all assets; and
  - (c) Financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification.
- (ii) Net Worth. 13 C.F.R. § 124.104(c). For initial 8(a) eligibility, the net worth of an individual claiming disadvantage must be less than \$250,000. For continued 8(a) eligibility, net worth must be less than \$750,000.
- (2) The firm must have been in business for two full years in the industry for which it seeks certification.
- (3) The firm must possess the potential for success. 15 U.S.C. § 637(a)(7). The SBA is responsible for determining which firms are eligible for the 8(a) program. The SBA has reasonable discretion to deny participation in the 8(a) program to clearly unqualified firms as long as applications receive careful and thorough review. See Neuma Corp. v. Abdnor, 713 F. Supp. 1 (D.D.C. 1989).

- d. The firm must have an approved business plan. 15 U.S.C. § 636(j)(10)(1).
- e. Generally, the SBA will not accept an 8(a) reservation if:
  - (1) An activity already has issued a solicitation as a small business or SDB set-aside;
  - (2) An activity has indicated publicly an intent to issue a solicitation as a small business or SDB set-aside; or
  - (3) The SBA determines that inclusion of a requirement in the 8(a) program will affect a small business or SDB adversely. 13 C.F.R. § 124.504(c)(1)-(3)(2004). See Designer Assocs., B-293226, Feb. 12, 2004, CPD ¶ 2004 ¶; C. Martin Co., Inc., B-292662, Nov. 6, 2003, CPD ¶ 2007; John Blood, B-280318-19, Aug. 31, 1998, 98-2 CPD ¶ 58; McNeil Technologies, Inc., B-254909, Jan. 25, 1994, 94-1 CPD ¶ 40.

## 2. Procedures.

- a. If the activity decides that an 8(a) contract is feasible, it offers SBA an opportunity to participate.
- b. If the SBA accepts, the agency or the SBA chooses a contractor, or eligible firms compete for award. See Defense Logistics Agency and Small Bus. Admin. Contract No. DLA100-78-C-5201, B-225175, Feb. 4, 1987, 87-1 CPD ¶ 115.
- c. Activities must generally compete acquisitions if:
  - (1) The activity expects offers from two eligible, responsible 8(a) firms at a fair market price, see Horioka Enters., B-259483, Dec. 20, 1994, 94-2 CPD ¶ 255; and

- (2) The value of the contract is expected to exceed \$5 million for actions assigned manufacturing NAICS codes or \$3 million for all other codes. See 13 C.F.R. § 124.506(a); FAR § 19.805-1(a)(2). The threshold applies to the agency's estimate of the total value of the contract, including all options. Id.
- d. The COC procedures do not apply to sole source 8(a) acquisitions. DAE Corp. v. SBA, 958 F.2d 436 (1992); Action Serv. Corp. v. Garrett, 797 F. Supp. 82 (D.P.R. 1992); Universal Automation Leasing Corp., GSBICA No. 11268-P, 91-3 BCA ¶ 24,255; Joa Quin Mfg. Corp., B-255298, Feb. 23, 1994, 94-1 CPD ¶ 140; Aviation Sys. & Mfg., Inc., B-250625.3, Feb. 18, 1993, 93-1 CPD ¶ 155; Alamo Contracting Enters., B-249265.2, Nov. 20, 1992, 92-2 CPD ¶ 358.
- e. Subcontracting limitations apply to competitive 8(a) acquisitions. See FAR 52.219-14; Data Equip., Inc. v. Dep't of the Air Force, GSBICA No. 12506-P, 94-1 BCA ¶ 26,446; see also Tonya, Inc. v. United States, 28 Fed. Cl. 727 (1993); Jasper Painting Serv., Inc., B-251092, Mar. 4, 1993, 93-1 CPD ¶ 204.
- f. Partnership between General Services Administration (GSA) and SBA.<sup>1</sup>
- (1) SBA agreed to accept all 8(a) firms in GSA's Multiple Award Schedule Program.
- (2) Agencies that buy from a Federal Supply Schedule 8(a) contractor may count the purchase toward the agency's small business goals.
- g. Graduation from 8(a) program. Firms graduate from the 8(a) program when they successfully achieve the targets, objectives, and goals set forth in their business plan prior to expiration of the program term. 13 C.F.R. § 124.208. See Gutierrez-Palmenberg, Inc., B-255797.3, Aug. 11, 1994, 94-2 CPD ¶ 158.

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<sup>1</sup>. Press release highlighting agreement available at <http://ftp.sbaonline.sba.gov/news/current00/00-58.pdf>.

- (1) The program is divided into two stages: a “developmental” stage and a “transitional” stage. 13 C.F.R. § 124.303.
  - (2) For firms approved for 8(a) participation after 15 November 1998, the developmental stage is four years and the transitional stage is five years.
  - (3) 8(a) time period upheld. Minority Bus. Legal Defense & Educ. Funds, Inc. v. Small Bus. Admin., 557 F. Supp. 37 (D.D.C. 1982). No abuse of discretion by refusing to keep a contractor in 8(a) program beyond nine years. Woerner v. United States, 934 F.2d 1277 (App. D.C. 1991).
- h. The GAO will not consider challenges to an award of an 8(a) contract by contractors that are not eligible for the program or particular acquisition. CW Constr. Servs. & Materials, Inc., B-279724, July 15, 1998, 98-2 CPD ¶ 20 (SBA reasonably determined that protestor was ineligible for award of 8(a) construction contract because it failed to provide sufficient information to show that it established and maintained an office within geographical area specified in solicitation as required by SBA regulations); AVW Elec. Sys., Inc., B-252399, May 17, 1993, 93-1 CPD ¶ 386. Likewise, the GAO will not consider challenges to a SBA decision that an 8(a) contractor is not competent to perform a contract. L. Washington & Assocs., B-255162, Oct. 19, 1993, 93-2 CPD ¶ 254.
- i. The SBA has broad discretion in selecting procurements for the 8(a) program; the GAO will not consider a protest challenging a decision to procure under the 8(a) program absent a showing of possible bad faith on the part of the government officials or that regulations may have been violated. 4 C.F.R. § 21.5(b)(3)(2004). See American Consulting Servs., Inc., B-276149.2, B-276537.2, July 31, 1997, 97-2 CPD ¶ 37; Comint Sys. Corp., B-274853, B-274853.2, Jan. 8, 1997, 97-2, CPD ¶ 14.
3. Mentor/Protégé Program. 13 C.F.R. § 124.520.

- a. The Mentor/Protégé Program is designed to encourage approved mentors to provide various forms of assistance to eligible 8(a) contractors. The purpose of mentor/protégé relationship is to enhance the capabilities of the protégé and to improve its ability to successfully compete for contracts. This assistance may include:
  - (1) Technical and/or management assistance;
  - (2) Financial assistance in the form of equity investments and/or loans;
  - (3) Subcontracts; and
  - (4) Joint ventures arrangements.
- b. Mentors. Any concern that demonstrates a commitment and the ability to assist an 8(a) contractor may act as a mentor.
- c. A mentor benefits from the relationship in that it may:
  - (1) Joint venture as a small business for any government procurement;
  - (2) Own an equity interest in the protégé firm up to 40%; and
  - (3) Qualify for other assistance by the SBA.

B. Challenge to the 8(a) program

1. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995). In a five to four holding, the Supreme Court declared that all racial classifications, whether benign or pernicious, must be analyzed by a reviewing court using a “**strict scrutiny**” standard. Thus, only those affirmative action programs that are narrowly tailored to achieve a compelling government interest will pass constitutional muster. Cf. American Federation of Government Employees (AFL-CIO) v. United States, 195 F. Supp. 2d 4 (D.D.C. 2002) (holding that the rational basis standard is still applicable to “political” (Native-American) rather than racial classifications).
2. Post-Adarand Reactions and Initiatives. *See* 49 C.F.R. § 26 (2000) (current DOT regulations implementing DBE program).
3. Post-Adarand Cases. Cache Valley Elec. Co. v. State of Utah, 149 F.3d 1119 (10th Cir. 1998); Cortez III Serv. Corp. v. National Aeronautics & Space Admin., 950 F. Supp. 357 (D.D.C. 1996); Ellsworth Assocs v. United States, 937 F. Supp. 1 (D.D.C. 1996); SRS Technologies v. Department of Defense, 917 F. Supp. 841 (D.D.C. 1996); Dynalantic Corp. v. Department of Defense, 894 F. Supp. 995 (D.D.C. 1995); C.S. McCrossan Constr. Co., Inc. v. Cook, 1996 U.S. Dist. LEXIS 14721 40 Cont. Cas. Fed. ¶ 76,917 (D.N.M. 1996); Sherbrooke Turf Inc. v. Minn. Dep’t of Transp., 2001 U.S. Dist. LEXIS 19565 (Nov. 14, 2001).
4. Adarand on Remand. Adarand Constructors, Inc. v. Pena, 965 F. Supp. 1556 (D. Colo. 1997). *But see* Adarand Constructors, Inc. v. Slater, 169 F.3d 1292 (10th Cir. 1999); Adarand Constructors, Inc. v. Slater, 120 S. Ct. 722 (2000). Adarand Constructors, Inc., v. Slater, 228 F. 3d 1147 (10th Cir. 2000); Adarand Constructors, Inc. v. Mineta, 122 S. Ct. 511 (2001) (cert. dismissed).

C. Small Disadvantaged Business (SDBs) Procurements. FAR Part 19.

1. Introduction.
  - a. On 24 June 1998, the Clinton Administration unveiled its long-awaited rules revamping its approach to helping small disadvantaged businesses win federal contracts. The rules were published in the 30 June 1998 Federal Register.

- b. The new rules permit eligible SDBs to receive price evaluation adjustments in Federal procurement programs.
- c. The Department of Commerce will determine the price adjustments available for use in Federal procurement programs. The Department of Commerce specified the price adjustments by NAICS major groups and regions. 63 Fed. Reg. 35,714 (June 30, 1998); FAR 19.201(b).
- d. Under the new regulations, the Department of Commerce is responsible for the following:
  - (1) Developing the methodology for calculating the benchmark limitations;
  - (2) Developing the methodology for calculating the size of the price evaluation adjustment that should be employed in a given industry; and
  - (3) Determining applicable adjustments.

2. Benchmarking. 63 Fed. Reg. 35,767 (June 30, 1998).

- a. Only SDBs in industries that show the ongoing effects of discrimination will be able to receive up to a 10% price evaluation adjustment in bidding for government contracts at the prime contract level. *See Rothe Development Corporation v. U.S. Department of Defense*, 2001 U.S. App. LEXIS 18751 (Aug. 20, 2001) (holding that the price evaluation adjustment is subject to *Adarand* “strict scrutiny” analysis).
- b. The Department of Commerce identified the following industries (or segments of the industries) that would be eligible for price evaluation adjustments: agriculture, forestry, fishing, mining, construction, manufacturing, transportation, communications, wholesale and retail trade, finance, insurance, and real estate among others. 63 Fed. Reg. 35,714 (June 30, 1998).

- c. The Department of Commerce is not limited to the price evaluation adjustment for SDB concerns where it has found substantial and persuasive evidence of:
    - (1) A persistent and significant underutilization of minority firms in a particular industry, attributable to past or present discrimination; and
    - (2) A demonstrated incapacity to alleviate the problem by using those mechanisms. FAR 19.201(b)(1-2).
  - d. If an agency makes an affirmative determination that the SDB mechanism has an undue burden or is otherwise inappropriate, the determination shall be forwarded through agency channels to the OFPP, which shall review the determination with the Department of Commerce and the SBA. After consultation with OFPP (or if the agency does not receive a response within 90 days) the agency may limit the use of the SDB mechanism until the Department of Commerce determines the updated price evaluation adjustment.
- 3. To be eligible to receive a benefit as a prime contractor based on disadvantaged status, a concern, at the time of its offer must either be certified as a SDB or have a completed SDB application at the SBA or a Private Certifier. FAR 19.304(a).
  - 4. Protesting a representation of disadvantaged business status. FAR 19.305.
  - 5. DOD's Approach.
    - a. 10 U.S.C. § 2323(e)(2), as amended by section 801 of the Strom Thurmond Defense Authorization Act of 1999 provided that the price evaluation adjustment would only apply when DOD fails to achieve its goal of awarding five percent of its total contract dollars to small disadvantaged businesses in the previous fiscal year. The price evaluation adjustment has been suspended since that time and DOD extended the suspension from Feb. 24, 2003, to Feb. 23, 2004.

D. Assisting Women-Owned Enterprises. 15 U.S.C. § 644(g).



1. Recent amendments under FASA to the Small Business Act established a Government-wide goal for participation by women-owned and controlled small business concerns. The goal is not less than 5 % of the total value of all prime and subcontracts awards each fiscal year.<sup>2</sup>
  2. A small business is owned and controlled by women if 51% or more of the business is owned by one or more women, and the management and daily business operation of the concern are controlled by one or more women. 15 U.S.C. § 637(d)(3)(D).
- E. HUBZone. HUBZone Act of 1997, Title VI of Public Law 105-135, enacted on December 2, 1997 (111 Stat. 2592).
1. The purpose of the HUBZone program is to provide federal contracting assistance for qualified small business concerns located in historically underutilized business zones in an effort to increase employment opportunities. 13 C.F.R. § 126.100.
  2. The program applies to all federal departments and agencies that employ contracting officers. 13 C.F.R. § 126.101.
  3. Requirements to be a Qualified HUBZone Small Business Concern (SBC). 13 C.F.R. § 126.103.
    - a. The concern must be a HUBZone SBC as defined by 13 C.F.R. § 126.103; and
    - b. At least 35 % of the SBC's employees must reside in the HUBZone and the concern must certify that it will attempt to maintain this percentage during the performance of any HUBZone contract.
  4. An owner of a HUBZone SBC is a person who owns any legal or equitable interest in the concern. More specifically, SBCs included: corporations, partnerships, sole proprietorships and limited liability companies. 13 C.F.R. § 126.201.

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<sup>2</sup> On 23 May 2000, President Clinton signed Executive Order 13,157, 65 Fed. Reg. 34,035 (2000), highlighting his commitment to expanding opportunities for Women Owned Small Businesses. The EO sets out several steps Executive Agencies should take to increase contracting opportunities.

5. Size standards. 13 C.F.R. § 126.203. At time of application for certification, a HUBZone SBC must meet SBA's size standards for its primary industry classification.
6. Certification. 13 C.F.R. § 126.300. A SBC must apply to the SBA for certification.
7. Methods of Acquisition. 13 C.F.R. § 126.600. HUBZones contracts can be awarded through any of the following procurement methods:
  - a. Sole source awards;
  - b. Set-aside awards based on competition restricted to qualified HUBZone SBCs; or
  - c. Awards to qualified HUBZone SBCs through full and open competition after a price evaluation preference in favor of qualified HUBZone SBCs.
8. Simplified Acquisition Procedures. 13 C.F.R. § 126.608. If the requirement is below the simplified acquisition threshold, the contracting officer should set-aside the requirement for consideration among qualified HUBZone SBCs using simplified acquisition procedures.
9. A concern that is both a qualified HUBZone SBC and a SDB must receive the benefit of both the HUBZone price evaluation preference and the SDB price evaluation preference described in 10 U.S.C. § 2323, in full and open competition.
10. Subcontracting Limitations. 13 C.F.R. § 126.700. A qualified HUBZone SBC prime contractor can subcontract part of its HUBZone contract provided:
  - a. Service Contract (except Construction) – the SBC must spend at least 50 % of the cost of the contract performance incurred for personnel on the concern's employees or on the employees of other qualified HUBZone SBCs;

- b. General Construction – the SBC must spend at least 15 % of the cost of the contract performance incurred for personnel on the concern’s employees or on the employees of other qualified HUBZone SBCs;
- c. Special Trade Construction – the SBC must spend at least 25 % of the cost of the contract performance incurred for personnel on the concern’s employees or on the employees of other qualified HUBZone SBCs; and
- d. Supplies – the SBC must spend at least 50 % of the cost of the contract performance incurred for personnel on the concern’s employees or on the employees of other qualified HUBZone SBCs.

11. Protest Procedures. 13 C.F.R. § 126.801.

## **IV. THE RANDOLPH-SHEPPARD ACT**

### **A. REFERENCES**

- 1. The Randolph-Sheppard Act for the Blind 20 U.S.C. §§ 107-107f.
- 2. U.S. DEPT. OF DEFENSE, DIRECTIVE 1125.3, VENDING FACILITY PROGRAM FOR THE BLIND ON FEDERAL PROPERTY (7 Apr. 1978) [hereinafter DOD DIR. 1125.3]
- 3. 34 C.F.R. Part 395, Vending Facility Program for the Blind on Federal Property (Department of Education).
- 4. 32 C.F.R. Part 260, Vending Facility Program for the Blind on Federal Property (Department of Defense).
- 5. Gaydos, *The Randolph-Sheppard Act: A Trap for the Unwary Judge Advocate*, ARMY LAW. Feb. 1984, at 21.

### **B. History of the RSA.**

1. Purpose. The purpose of the Randolph-Sheppard Act was to provide blind persons with remunerative employment, enlarge the economic opportunities of the blind, and stimulate the blind to greater efforts in making themselves self-supporting. 20 U.S.C. § 107a.
2. Original Act. Act of June 20, 1936, Pub. L. No. 732, 49 Stat. 1559.
  - a. The purpose of the Act was for federal agencies to give blind vendors the authorization to operate in federal buildings.
  - b. The Act gave agency heads the discretion to exclude blind vendors from their building if the vending stands could not be properly and satisfactorily operated by blind persons.
  - c. Location of the stand, type of stand and issuing the license were all subject to approval of the federal agency in charge of the building.
  - d. Office of Education, Department of Interior, was designated to administer the program, and could designate state commissions or agencies to perform licensing functions. Department of Education Regulations appear to take precedence over other agency regulations in the event of a conflict.  
61 Fed. Reg. 4,629, February 7, 1996.
3. The 1954 Amendments. Act of Aug. 3, 1954, Pub. L. No. 565m, 68 Stat. 663 (1954).
  - a. The invention of vending machines served as an impetus to re-examine the Act. The amendments also showed concern for expanding the opportunities of the blind.
  - b. The amendments made three main changes to the act:
    - (1) The vending program was changed from federal *buildings* to federal *properties*. Federal property was defined as “any building, land, or other real property owned, leased, or occupied by any department or agency of the United States.” The Act applies to all federal activities—whether appropriated or nonappropriated activities.

- (2) Agencies were required to give blind persons a preference, so far as feasible, when deciding who could operate vending stands on federal property.
    - (3) This preference was protected by requiring agencies to write regulations assuring the preference.
  - c. The “so far as feasible” language still gave agencies wide discretion in administering the Act, and reality fell far short of Congressional intent to expand the blind vending program.
- 4. The 1974 Amendments. Act of Dec 7, 1974, Pub. L. No. 516, 88 Stat. 1623 (1974).
  - a. Impetus—the proliferation of automatic vending machines and lack of enthusiasm for the Act by federal agencies.
  - b. Comptroller General study showcased the abuses and ineffectiveness of the Act. Review of Vending Operations on Federally Controlled Property, Comp. Gen. Rpt. No. B-176886 (Sept. 27, 1973).

#### C. Current Act

- 1. The current RSA imposes several substantive and procedural controls. The Act mandated three main substantive provisions:
  - a. Give blind vendors priority on federal property;
  - b. New buildings to include satisfactory sites for blind vendors; and
  - c. Require paying some vending machine income to the blind.
- 2. Priority to Blind Vendors.

- a. In authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency. 20 U.S.C. § 107(b).
- b. The Secretary of Education, the Commissioner of Rehabilitative Services Administration, and the federal agencies shall prescribe regulations which assure priority.
- c. Vending facilities are defined as “automatic vending machines, cafeterias, snack bars, cart services, shelters, counters, and such other appropriate auxiliary equipment...[which is]...necessary for the sale of articles or services...and which may be operated by blind licensees.” 20 U.S.C. § 107e(7).
  - (1) Vending facilities typically sell newspapers, periodicals, confections, tobacco products, foods, beverages, and other articles or services dispensed automatically or manually and prepared on or off the premises, and include the vending or exchange of chances for any State lottery. 20 U.S.C. § 107a(a)(5). See, e.g., Conduct on the Pentagon Reservation, 32 C.F.R. Parts 40b and 234, para. 234.16, exempting sale of lottery tickets by Randolph-Sheppard vending facilities from the general prohibition of gambling.
  - (2) Vending machines are defined as coin or currency operated machines that dispense articles or services, except for items of a recreational nature, such as jukeboxes, pinball machines, electronic game machines, pool tables, and telephones. 32 C.F.R. § 260.6(q).
  - (3) The Act’s definition of vending facilities lumps vending machines, vending stands, and cafeterias into the same definition. Despite this single definition, DOD once treated vending machines and vending stands much differently from cafeteria operations.

- (4) Opportunities regarding vending machines and stands are the burden of the State Licensing Agency (SLA). The SLA must seek out and apply for a permit. The installation has no affirmative obligation until the permit request is received. Once received, the blind vendor has priority unless the interests of the U.S. are adversely affected.<sup>3</sup>

#### D. Arbitration Procedures

##### 1. Arbitration procedures. Two roads to arbitration:

- a. Grievances of Blind vendors. A dissatisfied blind vendor may submit a request to the SLA for a full evidentiary hearing on any action arising from the operation or administration of the vending facility program. 20 U.S.C. § 107d-1. If the blind vendor is dissatisfied with the decision made by the SLA, the vendor may file a complaint with the Secretary of Education who shall convene a panel to arbitrate the dispute.
- b. Complaints by the SLA. SLA may file a complaint with the Secretary of Education if it determines that the agency is failing to comply with the Randolph-Sheppard Act or its implementing regulations. Upon filing of such a complaint the Secretary convenes a panel to arbitrate. The panel's decision is final and binding on the parties, except that appeal may be made under the Administrative Procedure Act. 20 U.S.C. § 107d-1(b) and 20 U.S.C. § 107d-2(a). **NOTE:** The arbitration procedures do not provide the blind vendors with a cause of action against any agency. The blind vendors have an avenue to complain of wrongs by the SLA. The SLA has a forum to complain against a federal agency, which it believes is in violation of the act.

#### E. Protests to the Government Accountability Office

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<sup>3</sup> The DOD regulation, 32 CFR § 260.3(i), requires notification to the SLA at least 60 days prior to the intended acquisition, alteration, or renovation of agency buildings. Opportunities regarding cafeterias must be solicited by sending the SLA a copy of each solicitation. If the proposal is not within the competitive range, the award may be made to another offeror. If the submitted proposal is within the competitive range, the blind vendor receives the contract unless the award adversely affects the interests of the U.S., or if the vendor does not have the capacity to operate a cafeteria in such a manner as to provide food service at a comparable cost and quality as other providers.

1. Relationship to the Small Business Act's 8(a) Provisions. The requirements of the Randolph-Sheppard Act take precedence over the 8(a) program. Triple P. Services, Inc., Recon., B-250465.8, December 30, 1993, 93-2 CPD ¶ 347 (denying challenge to agency's decision to withdraw and 8(a) set aside and to proceed under the Randolph-Sheppard Act). But see Intermark, B-290925, Oct. 23, 2002 (holding that the Army improperly withdrew a small-business set-aside solicitation for food services at Fort Rucker and reissued a solicitation for RSA businesses. GAO recommended a "cascading" set of priorities whereby competition is limited to small business concerns, with the SLA receiving award if its proposal is found to be within the competitive range).
2. Protest by State Licensing Agency. The GAO will not consider a protest lodged by an SLA, because binding arbitration is the appropriate statutory remedy for the SLA. Mississippi State Department of Rehabilitation Services, B-250783.8, Sept. 7, 1994 (unpub).

F. Controversial Issues

1. Burger King and McDonald's restaurants on military installations. AAFES Burger King and McDonald's franchise agreements violated two provisions of the Randolph-Sheppard Act:
  - a. DOD failed to notify state licensing agencies of its intention to solicit bids for vending facilities, and
  - b. DOD's solicitation for nationally franchised fast food restaurants constituted a limitation on the placement or operation of a vending facility. DOD violated the Randolph-Sheppard Act by failing to seek the Secretary of Education's approval for such limitation.
  - c. Arbitration Panel's remedy:
    - (1) AAFES must contact the SLA in each state with a Burger King facility to establish a procedure acceptable to the SLA for identifying, training, and installing blind vendors as managers of all current and future Burger King operations. Additionally, DOD should give the SLA 120 days written notice of any new Burger King operations.



- (2) AAFES will provide the appropriate SAL with 120 days notice of any new McDonald's facility. The SLA must determine whether it wishes to exercise its priority and to provide funds to build and operate a new McDonald's facility. 60 Fed. Reg. 4406, January 23, 1995. See also Randolph-Sheppard Vendors of America v. Weinberger, 795 F.2d 90 (Fed. Cir. 1986). SLA sued protesting contracts between AAFES and Burger King, and the Navy Exchange Service and McDonald's. The court remanded to the District Court with an order to dismiss, because the SLA had failed to exhaust administrative remedies.

G. **Applicability to Military Mess Hall Contracts.** The Government Accountability Office has determined that the Randolph-Sheppard Act applies to military dining facilities. In doing so, the GAO focused on the regulatory definition of "cafeteria." In addition the GAO gave significant weight to the regulatory interpretation of the Department of Education and to interpretations by certain high level officials within DOD. Department of the Air Force—Reconsideration, B-250465.6, June 4, 1993, 93-1 CPD ¶ 431. The applicability of the Randolph-Sheppard Act to mess halls remains a topic of considerable debate.

1. In NISH v. Cohen, 247 F.3d 197 (4th Cir. 2001), the Fourth Circuit affirmed a District Court holding that the Act applied to military "mess hall services." Court relied heavily on the DOD position that Randolph-Sheppard applies.
2. In Automated Comm'n Sys., Inc. v. United States, 49 Fed. Cl. 570 (2001), the Court of Federal Claims (COFC) refused to hear a challenge to the validity of DOD Directive 1125.3, which mandated the RSA preference for dining facility contracts. COFC concluded that only federal district courts may hear a challenge to the validity of procurement statutes and regulations under their federal question and declaratory judgment authorities. COFC also held that the more specific RSA preference takes precedence over less-specific statutes, specifically, the HUBZone preference.

## V. THE BUY AMERICAN ACT (BAA).

- A. Origin and Purpose. 41 U.S.C. §§ 10a-10d (1995); Executive Order 10582 (1954), as amended, Executive Order 11051 (1962). The Act was passed during the Depression of the 1930s and was designed to save and create jobs for American workers.
- B. Preference for Domestic Products/Services.
  - 1. As a general rule, under the BAA, agencies may acquire only domestic end items. Unless another law or regulation prohibits the purchase of foreign end items, however, the contracting officer may not reject as nonresponsive an offer of such items.
  - 2. The prohibition against the purchase of foreign goods does not apply if: the product is not available in sufficient commercial quantities; domestic preference would be inconsistent with the public interest; the product is for use outside the United States; the cost of the domestic product would be unreasonable; or the product is for commissary resale. The Trade Agreements Act and the North American Free Trade Agreement may also provide exceptions to the Buy American Act.
- C. Definitions and Applicability. FAR 25.003.
  - 1. Manufactured domestic end products are those articles, materials, and supplies acquired for public use under the contract that are:
    - a. Manufactured in the United States. Valentec Wells, Inc., ASBCA No. 41659, 91-3 BCA ¶ 24,168; General Kinetics, Inc., Cryptek Div., 242052.2, May 7, 1991, 70 Comp. Gen. 473, 91-1 CPD ¶ 445 (“manufacture” means completion of the article in the form required for use by the government); A. Hirsh, Inc., B-237466, Feb. 28, 1990, 69 Comp. Gen. 307, 90-1 CPD ¶ 247 (manufacturing occurs when material undergoes a substantial change); Ballantine Labs., Inc., ASBCA No. 35138, 88-2 BCA ¶ 20,660; and

- b. Comprised of “substantially all” domestic components (over 50% test by cost). For DOD, the components may be domestic or qualifying country components. See DFARS 252.225-7001.
2. An unmanufactured domestic end product must be mined or produced in the United States. Geography determines the origin of an unmanufactured end product. 41 U.S.C. § 10a and §10b.
3. The nationality of the company that manufactures an end item is irrelevant. Military Optic, Inc., B-245010.3, Jan. 16, 1992, 92-1 CPD ¶ 78.
4. Components are materials and supplies incorporated directly into the end product. Orlite Eng’g Co., B-229615, Mar. 23, 1988, 88-1 CPD ¶ 300; Yohar Supply Co., B-225480, Feb. 11, 1987, 66 Comp. Gen. 251, 87-1 CPD ¶ 152.
  - a. Parts are not components, and their origin is not considered in this evaluation. Hamilton Watch Co., B-179939, June 6, 1974, 74-1 CPD ¶ 306.
  - b. A component is either entirely foreign or entirely domestic. A component is domestic only if it is manufactured in the United States. Computer Hut Int’l, Inc., B-249421, Nov. 23, 1992, 92-2 CPD ¶ 364.
  - c. A foreign-made component may become domestic if it undergoes substantial remanufacturing in the United States. General Kinetics, Inc, Cryptek Div., B-242052.2, May 7, 1991, 70 Comp. Gen. 473, 91-1 CPD ¶ 445.
  - d. Material that undergoes manufacturing is not a “component” if the material is so transformed that it loses its original identity. See Orlite Eng’g and Yohar Supply Co., supra.
  - e. The cost of components includes transportation costs to the place of incorporation into the end product, and any applicable duty. FAR 25.101; DFARS 252.225-7001(a)(5)(ii). Component costs do **NOT** include:

- (1) Packaging costs, S.F. Durst & Co., B-160627, 46 Comp. Gen. 784 (1967);
- (2) The cost of testing after manufacture, Patterson Pump Co., B-200165, Dec. 31, 1980, 80-2 CPD ¶ 453; Bell Helicopter Textron, B-195268, 59 Comp. Gen. 158 (1979); or
- (3) The cost of combining components into an end product, To the Secretary of the Interior, B-123891, 35 Comp. Gen. 7 (1955).

5. Qualifying country end products/components. See DFARS 225.872.

- a. DOD does not apply the restrictions of the BAA when acquiring equipment or supplies that are mined, produced, or manufactured in “qualifying countries.” Qualifying countries are countries with which we have reciprocal defense agreements. They are enumerated in DFARS 225.872-1(a).
- b. A manufactured, qualifying country end product must contain over 50 % (by cost) components mined, produced, or manufactured in the qualifying country or the United States. DFARS 252.225-7001(a)(7).
- c. Qualifying country items thus receive a “double benefit” under the BAA. First, qualifying country components may be incorporated into a product manufactured in the United States to become a domestic end product. Second, products manufactured by a qualifying country are exempt from the BAA.

D. Certification Requirement.

1. A contractor certifies by its offer that each end product is domestic and/or indicates which end products are foreign. FAR 52.225-1; DFARS 252.225-7006.

2. The contracting officer may rely on the offeror's certification that its product is domestic, unless, prior to award, the contracting officer has reason to question the certification. New York Elevator Co., B-250992, Mar. 3, 1993, 93-1 CPD ¶ 196 (construction materials); Barcode Indus., B-240173. Oct. 16, 1990, 90-2 CPD ¶ 299; American Instr. Corp., B-239997, Oct. 12, 1990, 90-2 CPD ¶ 287.
- E. Exceptions to the Buy American Act. As a general rule, the Buy American Act does not apply in the following situations:
1. The required products are not available in sufficient commercial quantities. FAR 25.103(b); Midwest Dynamometer & Eng'g Co., B-252168, May 24, 1993, 93-1 CPD ¶ 408.
  2. The agency head (or designee) determines that domestic preference is inconsistent with the public interest. FAR 25.103(a). DOD has determined that it is inconsistent with the public interest to apply the BAA to qualifying countries. Technical Sys. Inc., B-225143, Mar. 3, 1987, 66 Comp. Gen. 297, 87-1 CPD ¶ 240.
  3. The Trade Agreements Act (TAA) authorizes the purchase. 19 U.S.C. §§ 2501-82; FAR 25.4; Olympic Container Corp., B-250403, Jan. 29, 1993, 93-1 CPD ¶ 89; Becton Dickinson AcuteCare, B-238942, July 20, 1990, 90-2 CPD ¶ 55; IBM Corp., GSBICA No. 10532-P, 90-2 BCA ¶ 22,824.
    - a. If the TAA applies to the purchase, only domestic products, products from **designated** foreign countries, qualifying country products, and products which, though comprised of over 50% foreign components, are "substantially transformed" in the United States or a designated country, are eligible for award. See Compuadd Corp. v. Dep't of the Air Force, GSBICA No. 12021-P, 93-2 BCA ¶ 25,811 ("manufacturing" standard of the BAA is less stringent than "substantial transformation" required under TAA); Hung Myung (USA) Ltd., B-244686, Nov. 7, 1991, 71 Comp. Gen. 64, 91-2 CPD ¶ 434; TLT-Babcock, Inc., B-244423, Sept. 13, 1991, 91-2 CPD ¶ 242.
    - b. The TAA applies only if the estimated cost of an acquisition equals or exceeds a threshold (currently \$190,000 for supplies) set by the U.S. Trade Representative.

- c. The TAA does **not** apply to DOD unless the DFARS lists the product, even if the threshold is met. See DFARS 225.401-70. If the TAA does not apply, the acquisition is subject to the BAA. See, e.g., Hung Myung (USA) Ltd., B-244686, Nov. 7, 1991, 91-2 CPD ¶ 434; General Kinetics, Inc, Cryptek Div., 242052.2, May 7, 1991, 91-1 CPD ¶ 445.
  - d. Because of the component test, the definition of “domestic end product” under the BAA is more restrictive than the definition of “U.S. made end product” under the TAA. Thus, for DOD, if an offeror submits a U.S. made end product, the BAA evaluation factor still may apply.
- 4. The North American Free Trade Agreement (NAFTA) Implementation Act authorizes the purchase. Pub. L. No. 103-182, 107 Stat. 2057 (1993); FAR 25.402. Note, however, that NAFTA does not apply to DOD procurements unless the DFARS lists the product. See DFARS 225.401-70.
- 5. The Caribbean Basin Economic Recovery Act authorizes the purchase. 19 U.S.C. §§ 2701-05; FAR 25.400.
- 6. The product is for use outside the United States. Note: under the Balance of Payments Program, an agency must buy domestic even if the end item is to be used overseas. A number of exceptions allow purchase of foreign products under this program. If both domestic and foreign products are offered, and if the low domestic price exceeds the low foreign price by more than 50%, the contracting officer must buy the foreign item. FAR Subpart 25.3; DFARS Subpart 225.3.
- 7. The cost of the domestic product is unreasonable. FAR 25.105; DFARS 225.103(c); FAR 225.5. Although cost reasonableness normally is a preaward determination, an agency may also make this determination after award. John C. Grimberg Co. v. United States, 869 F.2d 1475 (Fed. Cir. 1989).
  - a. Civilian agencies.

- (1) If an offer of a non-domestic product is low and a large business offers the lowest-priced, domestic product, increase the non-domestic product by 6%.
  - (2) If an offer of a non-domestic product is low and a small business offers the lowest-priced, domestic product, increase the non-domestic product by 12%.
- b. DOD agencies increase offers of non-domestic, non-qualifying country products by 50%, regardless of the size of the business that offers the lowest-priced, domestic end product. Under the DFARS, if application of the differential does not result in award on a domestic product, disregard the differential and evaluate offers at face value. DFARS 225.502.
  - c. Do not apply the evaluation factor to post-delivery services such as installation, testing, and training. Dynatest Consulting, Inc., B-257822.4, Mar. 1, 1995, 95-1 CPD ¶ 167.
  - d. In a negotiated procurement, agencies may award to a firm offering a technically superior but higher priced non-domestic, non-qualifying country product. STD Research Corp., B-252073.2, May 24, 1993, 93-1 CPD ¶ 406.

F. Construction Materials. 41 U.S.C. § 10b; FAR Subpart 25.2.

1. This portion of the BAA applies to contracts for the construction, alteration, or repair of any public building or public work in the United States.
2. The Act requires construction contractors to use only domestic materials in the United States.
3. Exceptions. This restriction does not apply if:
  - a. The cost would be unreasonable, as determined by the head of agency;

- b. The agency head (or delegee) determines that use of a particular domestic construction material would be impracticable; or,
  - c. The material is not available in sufficient commercial quantities. See FAR 25.103.
- 4. Application of the restriction. The restriction applies to the material in the form that the contractor brings it to the construction site. See S.J. Amoroso Constr. Co. v. United States, 26 Cl. Ct. 759 (1992), aff'd, 12 F.3d 1072 (Fed. Cir. 1993); Mauldin-Dorfmeier Constr., Inc., ASBCA No. 43633, 93-2 BCA ¶ 25,790 (board distinguishes “components” from “construction materials”); Mid-American Elevator Co., B-237282, Jan. 29, 1990, 90-1 CPD ¶ 125.
- 5. Post-Award exceptions.
  - a. Contractors must formally request waiver of the BAA. C. Sanchez & Son v. United States, 6 F.3d 1539 (Fed. Cir. 1993) (contractor failed to formally request waiver of BAA; claim for equitable adjustment for supplying domestic wire denied).
  - b. Failure to grant a request for waiver may be an abuse of discretion. John C. Grimberg Co. v. United States, 869 F.2d 1475 (Fed. Cir. 1989) (contracting officer abused discretion by denying post-award request for waiver of BAA, where price of domestic materials exceeded price of foreign materials plus differential).
- 6. The DOD qualifying country source provisions do not apply to construction materials. DFARS 225.872-2(b).

G. Remedies for Buy American Act Violations.

- 1. If the agency head finds a violation of the Buy American Act—Construction Materials, the findings and the name of the contractor are made public. The contractor will be debarred for three years. FAR 25.206.



2. Termination for default is proper if the contractor's product does not contain over 50% (by cost) domestic or qualifying country components. H&R Machinists Co., ASBCA No. 38440, 91-1 BCA ¶ 23,373.
3. A contractor is not entitled to an equitable adjustment for providing domestic end items if required by the BAA. Valentec Wells, Inc., ASBCA No. 41659, 91-3 BCA ¶ 24,168; LaCoste Builders, Inc., ASBCA No. 29884, 88-1 BCA ¶ 20,360; C. Sanchez & Son v. United States, *supra*.

H. The Berry Amendment 10 U.S.C. § 2241 (2000).

1. Restricts DOD's expenditure of funds on clothing to purchases from domestic firms.
2. The Beret Saga. *See* 43 THE GOV'T CONTRACTOR 18 at ¶ 191 (Associate Professor Stephen L. Schooner, George Washington University Law School, and Judge Advocate (USAR), discussing the purchase of black berets from foreign-owned contractors and Congress' response.
3. Result: only Service Secretaries and the Under Secretary of Defense for Acquisition, Technology, and Logistics have Berry Amendment waiver authority.
4. Still Problems? The DOD IG thinks so. See, e.g., U.S. DEP'T OF DEFENSE, INSPECTOR GENERAL, REP. NO. D-2002-066, *Buy American Act Issues on Procurements of Military Clothing* (Mar. 20, 2002), available at <http://www.dodig.osd.mil/audit/reprts/fy02/02-066.pdf>.

## VI. CONCLUSION.

## CHAPTER 11

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## CHAPTER 11

### COMPETITIVE SOURCING AND PRIVATIZATION

#### I. COMPETITIVE SOURCING.<sup>1</sup>

##### A. Origins and Development.

1. 1955: The Bureau of the Budget (predecessor of the Office of Management and Budget (OMB)) issued a series of bulletins establishing the federal policy to obtain goods and services from the private sector. See Federal Office of Management and Budget Circular A-76, Performance of Commercial Activities, ¶ 4.a (Aug. 4, 1983, Revised 1999) [hereinafter Circular A-76 (1999)].
2. 1966: The OMB first issued Circular A-76, which restated the federal policy and the principle that “[i]n the process of governing, the Government should not compete with its citizens.” The OMB revised the Circular in 1967, 1979, 1983, and again in 1999. See Circular A-76 (1999), ¶ 4.a.
3. 1996: The OMB issued a Revised Supplemental Handbook setting forth procedures for determining whether commercial activities should be performed under contract by a commercial source or in house using government employees. In June 1999, OMB updated the Revised Supplemental Handbook. See Circular A-76 (1999), ¶ 1.<sup>2</sup>

##### B. Past Legislative Roadblocks.

1. The National Defense Authorization Act for Fiscal Year (FY) 1989 allowed installation commanders to decide whether to study commercial activities for outsourcing. Pub. L. No. 101-189, § 11319a(1), 103 Stat.

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<sup>1</sup> While referred to in the past as “contracting out” or “outsourcing,” the current and preferred term-of-art is “competitive sourcing.”

<sup>2</sup> The Circular A-76 (1999), Revised Supplemental Handbook, and associated updates issued through OMB Transmittal Memoranda are available at <http://www.whitehouse.gov/omb/circulars/index.html>.

1352, 1560 (1989). Codified at 10 U.S.C. § 2468, this law expired on 30 September 1995. Most commanders opted not to conduct such studies due to costs in terms of money, employee morale, and workforce control.

2. The Department of Defense (DOD) Appropriations Act for FY 1991 prohibited funding Circular A-76 studies. See Pub. L. No. 101-511, § 8087, 104 Stat. 1856, 1896.<sup>3</sup>
3. The National Defense Authorization Acts for FY 1993 and FY 1994 prohibited DOD from entering into contracts stemming from cost comparison studies under Circular A-76. See Pub. L. No. 102-484, § 312, 106 Stat. 2315, 2365 (1992) and Pub. L. No. 103-160, § 313, 107 Stat. 1547, 1618 (1993).

C. DOD and Competitive Sourcing.

1. 1993: National Performance Review (NPR). Part of Vice President Gore's "reinventing government" initiative, the NPR stated public agencies should compete "for their customers . . . with the private sector." AL GORE, REPORT OF THE NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS, CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS (1993).
2. 1997: Quadrennial Defense Review (QDR). Addressing the issue of maintaining combat readiness, the QDR urged outsourcing defense support functions in order to focus on essential tasks while also lowering costs. WILLIAMS S. COHEN, REPORT ON THE QUADRENNIAL DEFENSE REVIEW 6 (May 1997).
3. 1997: Defense Reform Initiative (DRI). Expanding upon the QDR, the DRI recommended outsourcing more in-house functions and established outsourcing goals for DOD. WILLIAM S. COHEN, DEFENSE REFORM INITIATIVE REPORT (Nov. 1997).

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<sup>3</sup> While not a "roadblock," a recurring limitation in recent DOD Appropriations Acts prohibits the use of funds on Circular A-76 studies if the DOD component has exceeded twenty-four months to perform a single function study, or thirty months to perform a multi-function study. See Department of Defense Appropriations Act for FY 2005, Pub. L. No. 108-287, § 8022, 118 Stat. 951, 975 (2004). The thirty-month limitation represents a change from prior years, as previously Congress provided forty-eight months for multi-function studies. See e.g., Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248, § 8022, 116 Stat. 1519, 1541 (2002).

4. Between Fiscal Year (FY) 1997 and FY 2001, DOD had completed approximately 780 sourcing decisions involving more than 46,000 government positions (approximately 34,000 civilian positions and 12,000 military provisions). *See* GEN. ACCT. OFF., COMMERCIAL ACTIVITIES PANEL, IMPROVING THE SOURCING DECISIONS OF THE GOVERNMENT (2002) *available at* [www.gao.gov](http://www.gao.gov).
5. During 2004, DOD completed 70 sourcing decisions affecting over 8,200 jobs; ninety percent of these sourcing decisions resulted in in-house performance. The function that was the most frequent focus of sourcing decisions in 2004 was base facilities support and management. As of May 2005, DOD had already announced 17 competitions for 2005 which will affect over 13,000 civilian positions. *See*, OMB, REPORT ON COMPETITIVE SOURCING RESULTS: FISCAL YEAR 2004 (May 2005), *available at* [www.whitehouse.gov/omb](http://www.whitehouse.gov/omb).

D. Program Criticism.

1. In response to increasing criticism of the Circular A-76 process by both the public and private sectors, Congress, in Section 832 of the National Defense Authorization Act for FY 2001, tasked the Comptroller General to convene a panel of experts to study the Circular A-76 policies and procedures and to make appropriate recommendations as to possible changes. Pub. L. No. 106-398, 114 Stat. 1654, 1654A-220 (Oct. 30, 2000).
2. On 30 April 2002, the Commercial Activities Panel (CAP) released its final report, identifying weaknesses, as well as strengths, in the Circular A-76 procedures and making recommended changes. GEN. ACCT. OFF., COMMERCIAL ACTIVITIES PANEL, IMPROVING THE SOURCING DECISIONS OF THE GOVERNMENT (2002), *available at* [www.gao.gov](http://www.gao.gov).
3. Proposed Revision to Circular A-76. Based in part on the recommendations made by the CAP, on 19 November 2002, OMB published proposed changes to Circular A-76 and sought comments. *See* Office of Management and Budget; Performance of Commercial Activities, 67 Fed. Reg. 69,769 (Nov. 19, 2002). Over 700

individuals/organizations/agencies submitted comments to OMB regarding the proposed changes.<sup>4</sup>

E. Recent Development.

1. Following the receipt and consideration of the numerous comments received in response to the Proposed Revision, the OMB issued the “new” Circular A-76, effective 29 May 2003, superseding and rescinding the prior Circular A-76, the Revised Supplemental Handbook, OMB Circular A-76 Transmittal Memoranda Nos. 1-25, and Office of Federal Procurement Policy (OFPP) Policy Letter 92-1, *Inherently Governmental Functions*, Sept. 23, 1992. See Federal Office of Management and Budget Circular A-76 (Revised), Performance of Commercial Activities, ¶ 2 (May 23, 2003) [hereinafter Circular A-76 (Revised)].<sup>5</sup>
2. In general, the Circular A-76 (Revised) aims to:
  - a. provide new guidance for developing inventories of commercial and inherently governmental functions;
  - b. strengthen application of public-private competition;
  - c. incorporate “FAR-like” provisions; and
  - d. increase accountability.<sup>6</sup>
3. Applicability. The Circular A-76 (Revised) applies to all inventories required and streamlined and standard competitions initiated after the “effective date” (i.e., 29 May 2003). Circular A-76 (Revised) ¶ 6.

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<sup>4</sup> The Proposed Revision to OMB Circular A-76 and the public comments received in response during the thirty-day notice period are available at <http://www.whitehouse.gov/omb/circulars/index.html>.

<sup>5</sup> For additional discussion of the procedures and changes implemented by the Circular A-76 (Revised), see discussion *infra* at Part IV. The full text of Circular A-76 (2003) is available on-line at <http://www.whitehouse.gov/omb/circulars/index.html>.

<sup>6</sup> See Office of Management and Budget; Performance of Commercial Activities, 68 Fed. Reg. 32,134 (May 29, 2003). The Federal Register notice provides a good overview of the changes made by the issuance of the Circular A-76 (Revised), as well as OMB’s reasoning for some of the changes.

- a. Direct conversions initiated but not completed by the effective date must be converted to the streamlined or standard competitions under Revised Circular A-76. Circular A-76 (Revised) ¶ 7.a.
- b. Initiated cost comparisons for which solicitations have not been issued prior to the effective date must also be converted to standard competitions under the Circular A-76 (Revised), or, at the agency's discretion, converted to streamlined competitions under the new rules. Circular A-76 (Revised) ¶ 7.b.
- c. The rules in effect prior to issuance of the Revised Circular A-76 shall apply to all cost comparisons for which solicitations have already been issued, unless agencies elect to convert to the new procedures. Circular A-76 (Revised) ¶ 7.c.

## II. AGENCY ACTIVITY INVENTORY.

- A. Key Terms. The heart and soul of competitive sourcing rests on whether a governmental activity/function is categorized as commercial or inherently governmental in nature.
  - 1. Commercial Activity. A recurring service that could be performed by the private sector. Circular A-76 (Revised), Attachment A, ¶ B.2.
  - 2. Inherently Governmental Activities. An activity so intimately related to the public interest as to mandate performance by government personnel. Such "activities require the exercise of substantial discretion in applying government authority and/or making decisions for the government."<sup>7</sup> Circular A-76 (Revised), Attachment A, ¶ B.1.a. Inherently governmental activities fall into two broad categories:
    - a. The exercise of sovereign government authority.
    - b. The establishment of procedures and processes related to the oversight of monetary transactions or entitlements.

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<sup>7</sup> Cf. Federal Activities Inventory Reform Act (FAIR Act) of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998) (codified at 31 U.S.C. § 501 (note)), which states the term "inherently governmental function" includes activities that merely require the "exercise of discretion."



B. Inventory Requirement. Federal executive agencies are required to prepare annual inventories categorizing all activities performed by government personnel as either commercial or inherently governmental. The requirement is based on statute and the Circular A-76 (Revised).

1. Statutory Requirement - Federal Activities Inventory Reform Act (FAIR Act) of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998) (codified at 31 U.S.C. § 501 (note)).

- a. Codifies the definition of “inherently governmental” activity.
- b. Requires each executive agency to submit to OMB an annual list (by 30 June) of non-inherently governmental (commercial) activities. After mutual consultation, both OMB and the agency must make the list of commercial activities public. The agency must also forward the list to Congress.
- c. Provides “interested parties” the chance to challenge the list within 30 days after its publication. The “interested party” list includes a broad range of potential challengers to include the private sector, representatives of business/professional groups that include private sector sources, government employees, and the head of any labor organization referred to in 5 U.S.C. § 7103(a)(4).

2. Circular A-76 (Revised) Inventory Requirements.

- a. Requires agencies to submit to OMB by 30 June each year an inventory of commercial activities, an inventory of inherently governmental activities, as well as an inventory summary report. Circular A-76 (Revised), Attachment A, ¶ A.2.
- b. After OMB review and consultation, agencies will make both the inventory of commercial activities and the inventory of inherently governmental functions available to Congress and the public unless the information is classified or protected for national security reasons. Circular A-76 (Revised), Attachment A, ¶ A.4.

c. Categorization of Activities.

- (1) The agency competitive sourcing official (CSO)<sup>8</sup> must justify in writing any designation of an activity as inherently governmental. The justification will be provided to OMB and to the public, upon request. Circular A-76 (Revised), Attachment A, ¶ B.1.
- (2) Agencies must use one of six reason codes to identify the reason for government performance of a commercial activity.<sup>9</sup> When using reason code A, the CSO must provide sufficient written justification, which will be made available to OMB and the public, upon request. Circular A-76 (Revised), Attachment A, ¶ C.2.

d. Challenge Process.

- (1) The head of the agency must designate an inventory challenge authority and an inventory appeal authority.

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<sup>8</sup> The CSO is an assistant secretary or equivalent level official within an agency responsible for implementing the policies and procedures of the circular. Circular A-76 (Revised) ¶ 4.f. For the DOD, the designated CSO is the Deputy Under Secretary of Defense (Installations and Environment). Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments et al., subject: Designation of the Department of Defense Competitive Sourcing Official (12 Sept. 2003). The DOD CSO has in turn appointed DOD Component CSOs and charged them with providing Circular A-76 (Revised) implementation guidance within their respective Components. Memorandum, Deputy Under Secretary of Defense (Installations and Environment), to Assistant Secretary of the Army (Installations and Environment) et al., subject: Responsibilities of the DOD CSO and Component CSOs (29 Mar. 2004).

<sup>9</sup> The six reason codes include the following:

Reason code A – “commercial activity is not appropriate for private sector performance”;  
Reason code B – “commercial activity is suitable for a streamlined or standard competition”;  
Reason code C – “commercial activity is subject of an in-progress streamlined or standard competition”;  
Reason code D – “commercial activity is performed by government personnel as the result of a streamlined or standard competition . . . within the past five years;  
Reason code E – “commercial activity is pending an agency approved restructuring decision (e.g., base closure, realignment).  
Reason code F – “commercial activity is performed by government personnel due to a statutory prohibition against private sector performance.”

Circular A-76 (Revised), Attachment A, ¶ C.1, Figure A2.

- (a) Inventory Challenge Authorities. Must be “agency officials at the same level as, or a higher level than, the individual who prepared the inventory.” Circular A-76 (Revised), Attachment A, ¶ D.1.a.
- (b) Inventory Appeal Authorities. Must be “agency officials who are independent and at a higher level in the agency than inventory challenge authorities.” Circular A-76 (Revised), Attachment A, ¶ D.1.b.
- (2) Inventory challenges are limited to “classification of an activity as inherently governmental or commercial” or to the “application of reason codes.” Circular A-76 (Revised), Attachment A, ¶ D.2.<sup>10</sup>

### III. “OLD” CIRCULAR A-76.

#### A. Resources.

- 1. OMB Guidance. Circular A-76 (1999), Revised Supplemental Handbook, OMB Transmittal Memoranda 1-25.
- 2. DOD Guidance.<sup>11</sup>
  - a. U.S. Dep’t of Defense, Dir. 4100.15, Commercial Activities Program (10 Mar. 1989).
  - b. U.S. Dep’t of Defense, Instr. 4100.33, Commercial Activities Program Procedures (9 Sept. 1985 through Change 3 dated 6 Oct. 1995).

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<sup>10</sup> Originally the Circular A-76 (Revised) stated interested parties could only challenge “reclassifications” of activities. The OMB issued a technical correction, however, revising Attachment A, paragraph D.2 by deleting the word “reclassification” and inserting “classification.” Office of Mgmt. & Budget, Technical Correction to Office of Management and Budget Circular No. A-76, “Performance of Commercial Activities,” 68 Fed. Reg. 48,961, 48,962 (Aug. 15, 2003).

<sup>11</sup> The DOD Directive, Instruction, Interim Guidance, as well as the applicable regulations, instructions, and guidance of the various Armed Services are available at DOD’s SHARE A-76 website located at <http://sharea76.fedworx.org/inst/sharea76.nsf/CONTDEFLOOK/HOME-INDEX>.

- c. U.S. Dep't of Defense, Department of Defense Strategic and Competitive Sourcing Programs Interim Guidance (Apr. 3, 2000).

3. Military Department Guidance.

- a. U.S. Dep't of Army, Reg. 5-20, Commercial Activities Program (1 Oct. 1997).<sup>12</sup>
- b. U.S. Dep't of Army, Pam. 5-20, Commercial Activities Study Guide (31 Jul. 1998).
- c. U.S. Dep't of Air Force, Instr. 38-203, Commercial Activities Program (19 Jul. 2001).
- d. U.S. Dep't of Navy, Instr. 4860.7C, Navy Commercial Activities Program (7 June 1999).
- e. Marine Corps Order 4860.3D W/CH 1, Commercial Activities Program (14 Jan 92).

B. Key Players/Terms.

- 1. Congress. The DOD must notify Congress “before commencing to analyze” a commercial activity for possible change to performance by the private sector if more than 50 civilian employees perform the function. 10 U.S.C. § 2461(b).<sup>13</sup>
- 2. Performance Work Statement (PWS). The PWS defines the agency’s needs, the performance standards and measures, and the timeframe for performance. Revised Supplemental Handbook, Part I, Chapter 3, ¶ C.
- 3. Quality Assurance Surveillance Plan (QASP). The QASP outlines how federal employees will inspect either the in-house or the contractor performance. Revised Supplemental Handbook, Part I, Chapter 3, ¶ D.

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<sup>12</sup> On 23 May 2005, the Army issued a new AR 5-20, Competitive Sourcing Program, which implements the changes made by the Circular A-76 (Revised). The new AR is available at <http://www.usapa.army.mil/> by going to the “Official Publications” link then “New Releases.”

<sup>13</sup> As this is a statutory requirement it still applies to DOD under the Circular A-76 (Revised) procedures.

4. Cost Comparison Study Team. A group of functional experts in the agency who prepare plans and develop the agency's cost estimate. The team is responsible for developing:
  - a. The Management Plan, which defines the overall structure for the MEO. This organizational structure serves as the government's proposed work force for cost comparison purposes. Revised Supplemental Handbook, Part I, Chapter 3, ¶ E.1.
  - b. The Most Efficient Organization, which describes the way the government will perform the commercial activity and at what cost. Revised Supplemental Handbook, Part I, Chapter 3, ¶ E.2.
5. MEO Certification Official. An individual, organizationally independent of the function under study or at least two levels above the most senior official included in the MEO, who certifies the Management Plan as reflecting the government's MEO. Revised Supplemental Handbook, Part I, Chapter 3, ¶ E.3.
6. Independent Review Officer (IRO). The PWS, Management Plan, QASP, cost estimates, and supporting documentation are forwarded to the agency IRO. The IRO certifies compliance with applicable procedures and ensures the data establishes the MEO can perform the requirements of the PWS and that all costs are justified. Revised Supplemental Handbook, Part I, Chapter 3, ¶ I.
7. Administrative Appeal Authority (AAA). An individual, independent of the activity under review or at least two organization levels above the MEO certification official, responsible for the administrative appeal process. Revised Supplemental Handbook, Part I, Chapter 3, ¶ K.3.

C. Competition Procedures.

1. Direct Conversions. Activities with 10 or fewer full time equivalent employees (FTEs) may be converted without a cost comparison study. Revised Supplemental Handbook, Part I, Chapter 1, ¶ C.6.
2. Streamlined Cost Comparisons. Activities with 65 or fewer full time equivalent employees may use the simplified cost comparison procedures,

if it will serve the equity and fairness purposes of the Circular A-76. Revised Supplemental Handbook, Part II, Chapter 5.<sup>14</sup>

3. Cost Comparisons. If direct conversion or streamlined cost comparison procedures are inapplicable, the agency must conduct a full cost comparison study. See Revised Supplemental Handbook, Part I, Chapter 3, ¶ A.1.

D. Seeking/Evaluating Offers in Cost Comparisons.

1. Procurement Method. The Revised Supplemental Handbook permits all competitive methods provided under the FAR (e.g., sealed bidding, negotiated procurements). Revised Supplement Handbook, Part I, Chapter 3, ¶ H.1.
2. Solicitation/Evaluation. The agency issues a solicitation based on the PWS to seek bids/offers from the private sector. FAR 7.304(c).
  - a. For sealed bid procurements, the contracting officer opens all bids and the government's in-house cost estimate and enters the apparent low bid on the Cost Comparison Form. See generally Revised Supplemental Handbook, Part I, Chapter 3, ¶ J.1; FAR 7.306(a).
  - b. For negotiated procurements, the Source Selection Authority (SSA) evaluates and selects the private sector offeror that represents the "most advantageous proposal" in accordance with the solicitation's stated evaluation criteria. The cost of this proposal is compared against the government's in-house cost estimate. See generally Revised Supplemental Handbook, Part I, Chapter 3, ¶ J.3; FAR 7.306(b).
3. "Cost/Technical Trade-Offs" in Negotiated Procurements. Negotiated procurements contemplating a "cost/technical trade-off" evaluation

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<sup>14</sup> A recurring provision in the DOD Appropriations Act prohibits the DOD from converting to contractor performance any function involving more than 10 civilian employees until a "most efficient and cost effective organization analysis is completed . . ." Congress has granted the DOD a waiver to this analysis requirement, if directly converting performance of those functions to: 1) a Javits-Wagner-O'Day (JWOD) Act firm that employs blind or severely handicapped employees; or 2) a firm that is at least fifty-one percent owned by an American Indian tribe or Native Hawaiian organization. See Department of Defense Appropriations Act for FY 2005, Pub. L. No. 108-287, § 8014(b), 118 Stat. 951, 972 (2004).

involve an additional step. See Revised Supplemental Handbook, Part I, Chapter 3, ¶ H.3.

- a. Source Selection Authority. After the SSA reviews the private sector offers and identifies the offer that represents the “best value” to the government, the contracting officer submits to the SSA the government’s management plan (not the cost estimate) to ensure that it meets the same level of performance and performance quality as the private offer. Revised Supplemental Handbook, Part I, Chapter 3, ¶¶ H.3.c-d; see also, NWT, Inc.; PharmChem Laboratories, Inc., B-280988; B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158.
- b. Independent Review Officer. Once the government makes any and all the changes necessary to meet the performance standards set by the SSA, the government submits a revised cost estimate to the IRO. This review assures that the government’s in-house cost estimate is based upon the same scope of work and performance levels as the “best value” private sector offer. Revised Supplemental Handbook, Part I, Chapter 3, ¶ H.3.e.

E. Choosing the Winner.

1. The private offeror “wins” if its proposal costs beat the in-house cost estimate by a minimum cost differential of:
  - a. 10 percent of personnel costs, or
  - b. \$10 million over the performance period, whichever is less.

The minimum differential ensures that the government will not convert for marginal cost savings. Revised Supplemental Handbook, Part II, Chapter 4, ¶ A.1.

2. Otherwise, the MEO “wins” and the agency continues performance of the commercial activity in-house, using the staffing proposed by the MEO.

F. Post-Award Review.

1. Administrative Appeals Process. Revised Supplemental Handbook, Part I, Chapter 3, ¶ K; DODI 4100.33, ¶ 5.7; DOD Interim Guidance, Attach. 5; FAR 7.307.
  - a. Circular A-76 (1999) requires agencies to develop an internal administrative appeal process for challenges to cost comparison decisions.
    - (1) Generally, the agency must receive the appeal within 20 calendar days of announcement of tentative decision, which may be extended for complex studies. Revised Supplemental Handbook, Part I, Chapter 3, ¶ K.1.b. See FAR 52.207-2 (providing for a public review period of 15-30 working days, depending upon the complexity of the matter).
    - (2) The appeal must be based on noncompliance with the requirements and procedures of Circular A-76 or specific line items on the Cost Comparison Form.
  - b. All “interested parties” need to review the tentative cost-comparison decision and all supporting documentation and immediately identify and bring to the attention of the Administrative Appeals Board any potential errors that, if corrected, would provide for a more accurate determination. See Issuance of OMB Circular A-76 Transmittal Memorandum No. 22, 65 Fed. Reg. 54,568 (8 Sept 2000). “Interested parties” in this context includes affected federal employees/unions and the apparent winner of the tentative decision. Id. See also Revised Supplemental Handbook, Part I, Chapter 3, ¶ K.2.
  - c. Decision on Appeal. The agency should provide for a decision within 30 days after the Administrative Appeal Authority receives the appeal. Revised Supplemental Handbook, Part I, Chapter 3, ¶ K.8.



2. Protests to the Government Accountability Office (GAO). The GAO's normal bid protest procedures apply to competitive sourcing protests.

a. Standing.

- (1) Only an “interested party” as defined by the Competition in Contracting Act (CICA) may file a protest with the GAO: “an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.” 31 U.S.C. § 3551 (2). See American Overseas Marine Corp.; Sea Mobility, Inc., B-227965.2, B-227965.4, Aug. 20, 1987, 87-2 CPD ¶ 190 (holding protester not in line for award, so protest dismissed).
- (2) Affected federal employees/unions do not have standing to challenge Circular A-76 decisions at GAO, because affected employees/unions are not “actual or prospective bidders” and thus not “interested parties” under CICA. American Fed’n of Gov’t Employees, B-282904.2, 2000 U.S. Comp. Gen. LEXIS ¶ 83 (June 7, 2000); American Fed’n of Gov’t Employees, B-223323, 86-1 CPD ¶ 572; American Fed’n of Gov’t Employees, B-219590, B-219590.3, 86-1 CPD ¶ 436.

b. Timing.

- (1) The protester must exhaust the agency appeal process. See Issuance of OMB Circular A-76 Transmittal Memorandum No. 22, 65 Fed. Reg. 54,568 (8 Sept 2000). See also BAE Sys., B-287189, B-287189.2, May 14, 2001, 2001 CPD ¶ 86 (stating GAO adopted as policy, for the sake of comity and efficiency, the requirement for protestors to exhaust the available appeal process); Omni Corp., B-2281082, Dec. 22, 1998, 98-2 CPD ¶ 159 (dismissing as premature a protest filed with the GAO when protester challenged cost study before post-award debriefing at the end of the agency appeal process).

- (2) The protester must file the protest with GAO within 10 working days of initial adverse agency action on the protest. 4 C.F.R. § 21.2(a)(3); See Space Age Eng'g, Inc., B-230148, February 19, 1988, 88-1 CPD ¶ 173 (continuing to pursue protest with agency does not toll 10 day limit).

c. Standard of Review.

- (1) When reviewing cost comparison decisions, the GAO applies the following standard of review:
  - (a) whether the agency conducted the cost comparison reasonably;
  - (b) whether the agency complied with applicable procedures; and
  - (c) if the agency failed to follow procedures, whether the failure could have materially affected the outcome of the cost comparison. See Trajen, Inc. B-284310.2, Mar. 28, 2000, 2000 U.S. Comp. Gen. LEXIS 44.
- (2) Within reason, agencies will be accorded discretion in their cost comparison studies. See, e.g., RTS Travel Serv., B-283055, Sept. 23, 1999 (finding the agency properly adjusted the contractor's price for contract administration costs); Gemini Industries, Inc., B-281323, Jan. 25, 1999, 99-1 CPD ¶ 22 (finding the agency acted properly when it evaluated proposals against the estimate of proposed staffing); Symvionics, Inc., B-281199.2, Mar. 4, 1999, 99-1 CPD ¶ 48 (finding the agency conducted a fair cost comparison despite not sealing the Management Plan and MEO).

3. Federal Court Challenges.

- a. Jurisdiction. The Tucker Act, as amended by the Administrative Dispute Resolution Act of 1996 (ADRA), Pub. L. No. 104-320 (codified at 28 U.S.C. § 1491(b)(1)), provides the U.S. Court of Federal Claims (COFC) jurisdiction to hear pre-award and post-award bid protests.
- b. Standing.
  - (1) Only an “interested party” under the ADRA has standing to challenge procurement decisions. The Court of Appeals for the Federal Circuit (CAFC) established that “interested party” should be limited to those parties covered by CICA. *American Fed’n of Gov’t Employees, et al v. United States*, 258 F.3d 1294 (2001). Adopting the same CICA standard used by GAO, this case definitively answered the question of which standard to use in determining whether federal employees have standing in the Court of Federal Claims.
  - (2) Historically, employees and labor unions have had little success in federal court challenging the decision to outsource commercial activities.
    - (a) *AFGE, AFL-CIO, Local 1482 v. United States*, 46 Fed. Cl. 586 (2000) (holding federal employees/union lacked standing as they were not within the zone of interests protected by the statutes they alleged were violated). *Cf.* *AFGE, Local 2119 v. Cohen*, 171 F.3d 460 (7th Cir. 1999) (holding federal employees/unions at Rock Island Arsenal did not have standing under 10 U.S.C. § 2462 to challenge the Army’s decision to award two contracts to private contractors, but had standing under the Arsenal Act (10 U.S.C. § 2542)).
    - (b) *AFGE v. Clinton*, 180 F.3d 727 (6th Cir. 1999) (holding federal employees/union lacked standing to protest agency’s decision to directly convert positions to contractor performance, as their injury was not concrete and particularized).

- (c) NFFE v. Cheney, 883 F.2d 1038 (D.C. Cir. 1989) (holding displaced federal workers/unions do not have standing to challenge the A-76 cost comparison process); cf. Diebold v. United States, 947 F.2d 787 (6th Cir. 1991) (holding the government's decision to privatize an activity was subject to review under the Administrative Procedure Act (APA), but remanding the case to determine whether displaced federal employees and their union had standing to maintain the action).
- (d) Grievances. Circular A-76 is a government-wide regulation and the agency is not required to bargain over appropriate arrangements. Department of Treasury, IRS v. Federal Labor Relations Authority, 996 F.2d 1246, 1252 (D.C. Cir. 1993). See also Department of Treasury, IRS v. Federal Labor Relations Authority, 110 S.Ct. 1623 (1990); AFGE Local 1345 and Department of the Army, Fort Carson, 48 FLRA 168 (holding that proposal requiring an additional cost study to consider cost savings achievable by alternate methods such as furloughs and attrition was not negotiable).

4. Problem Areas/Issues.

- a. Ensuring the government Management Plan/MEO can meet the PWS requirements. See e.g., BAE Systems, B-287189, May 14, 2001, 2001 CPD ¶ 86 (finding the IRO failed to properly carry out his responsibility to ensure the MEO met the minimum PWS requirements and that it was properly adjusted to meet those performance levels).
- b. Ensuring the accuracy and fairness for the costs of in-house and contractor performance. See e.g., Del-Jen Inc., B-287273.2, Jan. 23, 2002, 2002 CPD ¶ 27 (determining the agency understated the administration costs of in-house performance and overstated the administration of contractor performance).

- c. Ensuring a “level playing field” in “cost/technical trade-off” negotiated procurements. See e.g., DynCorp Tech. Services, LLC, B-284833.3, July 17, 2001, 2001 CPD ¶ 112 (sustaining protest where the agency identified an “accelerated performance schedule” as a strength in the selected privates sector proposal but did not require the MEO to equal this performance level).
- d. Avoiding Organizational Conflicts of Interest (OCI). An OCI arises when, because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person’s objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage. FAR Subpart 9.5.
  - (1) Historically, OCI rules were applied to contractors; however, in 1999 the GAO found that government employees involved in Circular A-76 cost comparison study had an OCI that tainted the evaluation process, rendering it defective. See DZS/Baker LLC; Morrison Knudsen Corp., B-281224, Jan. 12, 1999, 99-1 CPD ¶ 19 (finding an OCI where 14 of 16 agency evaluators held positions that were the subject of the study).
  - (2) In 2000, OMB amended the Revised Supplemental Handbook and implemented new rules prohibiting employees whose positions are subject to a cost comparison study from participating as evaluators in the study. Issuance of OMB Circular A-76 Transmittal Memorandum No. 22, 65 Fed. Reg. 54,568 (8 Sept 2000).
  - (3) In December 2001, the GAO found an OCI where an agency employee and private consultant wrote and edited both the PWS and the in-house Management Plan. The Jones/Hill Joint Venture, B-286194.4, B-286194.5; B-286184.6, Dec. 5, 2001, 2001 CPD ¶ 194. Upon reconsideration, the GAO modified its recommended corrective action for addressing the OCI issue in the Jones/Hill decision, stating its recommendation only applied prospectively. Department of the Navy – Reconsideration, B-286194.7, May 29, 2002.

G. Final Decision and Implementation.

1. After all appeals/protests have been resolved, the decision summary is sent to the Secretary of Defense (SECDEF) for approval and notice is forwarded to Congress. See 10 U.S.C. § 2461(a). The FY 2003 National Defense Authorization Act amends 10 U.S.C. § 2461 to require the SECDEF to notify Congress of the outcome of a competitive sourcing study, regardless of whether the study recommends converting to contractor performance or retaining the function in-house.<sup>15</sup>
2. If the private sector offer wins, the contracting officer awards the contract. If the MEO wins the cost study, the solicitation is cancelled and the MEO implemented in accordance with the Management Plan.
3. Contractor Implementation.
  - a. Reviews. Contracted commercial activities are monitored to ensure that performance is satisfactory and cost effective.
  - b. If the contractor defaults during the first year:
    - (1) The contracting officer will award the work to the next lowest offeror that participated in the cost comparison study, if feasible.
    - (2) If it is not feasible to award to the next lowest offeror, the contracting officer “will immediately resolicit to conduct a revised and updated cost comparison.” Revised Supplemental Handbook, Part I, Chapter 3, para. L.7.
    - (3) If the contractor defaults after the first year, the contracting officer should seek interim contract support. If interim support is not feasible, in-house performance may be authorized by the commander on a temporary/emergency basis. See AFI 38-203, para. 19.7.

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<sup>15</sup> Bob Stump National Defense Authorization Act for FY 2003, Pub. L. No. 107-314, § 331, 116 Stat. 2458, 2512 (2002). Again, as this is a statutory requirement it still applies to the DOD under the Circular A-76 (Revised) procedures.

4. MEO Implementation.

- a. When performance is retained in-house, a post-MEO performance review will be conducted at the end of the first full year of performance. If the MEO has not been implemented or the MEO fails to perform, the contracting officer will award to the next lowest offeror if feasible, or immediately resolicit to conduct a new cost competition study. Revised Supplemental Handbook, Part I, Chapter 3, para. L.1, 7.
- b. The organization, position structure, and staffing of the implemented MEO will not normally be altered within the first year, although adjustments may be made for formal mission or scope of work changes. Revised Supplemental Handbook, Part I, Chapter 3, para. L.2.
- c. Agencies must review at least 20 percent of the functions retained in-house as the result of a cost comparison decision. Revised Supplemental Handbook, Part I, Chapter 3, para. L.3.

#### **IV. CIRCULAR A-76 (REVISED).**

A. Key Players/Terms.

- 1. Agency Tender. The agency management plan submitted in response to and in accordance with the requirements in a solicitation. The agency tender includes an MEO, agency cost estimate, MEO quality control and phase-in plans, and any subcontracts. Circular A-76 (Revised), Attachment D.
- 2. Agency Tender Official (ATO). An inherently governmental official with decision-making authority who is responsible for developing, certifying, and representing the agency tender. The ATO also designates members of the MEO team and is considered a “directly interested party” for contest purposes. The ATO must be independent of the contracting officer, SSA/SSEB, and the PWS team. Circular A-76 (Revised), Attachment B, ¶ A.8.a.
- 3. Contracting Officer (CO). An inherently governmental official who is a member of the PWS team and is responsible for issuing the solicitation

and the source selection methodology. The CO must be independent of the ATO, MEO team, and the human resource advisor (HRA). Circular A-76 (Revised), Attachment B, ¶ a.8.b and Attachment D.

4. PWS Team Leader. An inherently governmental official, independent of the ATO, HRO, and MEO team, who develops the PWS and QASP, determines government-furnished property, and assists the CO in developing the solicitation. Circular A-76 (Revised), Attachment B, ¶ a.8.c.
5. Human Resource Advisor (HRA). An inherently governmental official and human resource expert. The HRA must be independent of the CO, SSA, PWS team, and SSEB. As a member of the MEO team, the HRA assists the ATO and MEO team in developing the agency tender. The HRA is also responsible for employee and labor-relations requirements. Circular A-76 (Revised), Attachment B, ¶ a.8.d.
6. Source Selection Authority (SSA). An inherently governmental official appointed IAW FAR 15.303. The SSA must be independent of the ATO, HRA, and MEO team.

B. Competition Procedures.

1. Previously, agencies could “directly convert” to contractor performance functions performed by 10 or fewer full-time equivalents (FTEs). The Revised Circular A-76 eliminates the use of “direct conversions.” Office of Management and Budget; Performance of Commercial Activities, 68 Fed. Reg. 32,134; 32,136 (May 29, 2003).<sup>16</sup>
2. Streamlined Competitions. The new “streamlined competition” process must be used for activities performed by 65 or fewer FTEs “and/or any number of military personnel,” unless the agency elects to use the standard competition. Circular A-76 (Revised), Attachment B, ¶¶ A.5.b and C. The streamlined competition process includes:

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<sup>16</sup> While the Circular A-76 (Revised) eliminates “direct conversions” recall that Congress permits the DOD to directly convert performance of functions to: 1) a Javits-Wagner-O’Day (JWOD) Act firms that employ blind or severely handicapped employees; or 2) firms that are at least fifty-one percent owned by an American Indian tribe or Native Hawaiian organization. See Department of Defense Appropriations Act for FY 2005, Pub. L. No. 108-287, § 8014(b), 118 Stat. 951, 972 (2004).



- a. Determining the Cost of Agency Performance. An agency may determine the agency cost estimate on the incumbent activity; “however, an agency is encouraged to develop a more efficient organization, which may be an MEO.” Circular A-76 (Revised), Attachment B, ¶ C.1.a.<sup>17</sup>
  - b. Determining the Cost of Private Sector/Public Reimbursable Performance. An agency may use documented market research or solicit proposals IAW the FAR, to include using simplified acquisition tools. Circular A-76 (Revised), Attachment B, ¶ C.1.b; Office of Management and Budget; Performance of Commercial Activities, 68 Fed. Reg. 32,134; 32,137 (May 29, 2003).
  - c. Establishing Cost Estimate Firewalls. The individual(s) preparing the in-house cost estimate and the individual(s) soliciting private sector/public reimbursable cost estimates must be different and may not share information. Circular A-76 (Revised), Attachment B, ¶ C.1.d.
  - d. Implementing the Decision. For private sector performance decisions, the CO awards a contract IAW the FAR. For agency performance decisions, the CO executes a “letter of obligation” with an agency official responsible for the commercial activity. Circular A-76 (Revised), Attachment B, ¶ C.3.a.
3. Standard Competitions. The new “standard competition” procedures must be used for commercial activities performed by more than 65 FTEs. Circular A-76 (Revised), Attachment B, ¶ A.5.
    - a. Solicitation. When issuing a solicitation, the agency must comply with the FAR and clearly identify all the evaluation factors.
      - (1) The solicitation must state the agency tender is not required to include certain information such as a subcontracting plan goals, licensing or other certifications, or past performance information (unless the agency tender is based on an MEO implemented IAW the circular). Circular A-76 (Revised), Attachment B, ¶ D.3.a(4).

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<sup>17</sup> Though civilian agencies may determine the estimated cost of in-house performance without creating an MEO, the DOD’s ability to do so is limited. Recall that the DOD generally must complete a “most efficient and cost effective organization analysis” prior to converting any function that involves more than 10 civilian employees. See Department of Defense Appropriations Act for FY 2005, Pub. L. No. 108-287, § 8014(a), 118 Stat. 951, 972 (2004).

- (2) The solicitation closing date will be the same for private sector offers and agency tenders. Circular A-76 (Revised), Attachment B, ¶ D.3.a(5). If the ATO anticipates the agency tender will be submitted late, the ATO must notify the CO. The CO must then consult with the CSO to determine if amending the closing date is in the best interest of the government. Circular A-76 (Revised), Attachment B, ¶ D.4.a(2).

b. Source Selection.

- (1) In addition to sealed bidding and negotiated procurements based on a lowest priced technically acceptable source selections IAW the FAR, the Circular A-76 (Revised) also permits:

- (a) Phased Evaluation Source Selections.

- (i) Phase One - only technical factors are considered and all prospective providers (private sector, public reimbursable sources, and the agency tender) may propose alternative performance standards. If the SSA accepts an alternate performance standard, the solicitation is amended and revised proposals are requested. Circular A-76 (Revised), Attachment B, ¶ D.5.b.2.
- (ii) Phase Two – the SSA makes the performance decision after a price/cost realism analyses on all offers/tenders determined technically acceptable. Circular A-76 (Revised), Attachment B, ¶ D.5.b.2.

- (b) Cost-Technical Tradeoff Source Selections. May only be used in a standard competitions for (1) information technology activities, (2) commercial activities performed by the private sector, (3) new requirements, and (4) segregable expansions. Circular A-76 (Revised), Attachment B, ¶ D.5.b.3.

- (2) The agency tender is evaluated concurrently with the private sector proposals and may be excluded from a standard competition if materially deficient. Circular A-76 (Revised), Attachment B, ¶ D.5.c.1.
    - (a) If the CO conducts exchanges with the private sector offerors and the ATO, such exchanges must be IAW FAR 15.306, except that exchanges with the ATO must be in writing and the CO must maintain records of all such correspondence. Circular A-76 (Revised), Attachment B, ¶ D.5.c.2.
    - (b) If an ATO is unable to correct a material deficiency, “the CSO may advise the SSA to exclude the agency tender from the standard competition.” Circular A-76 (Revised), Attachment B, ¶ D.5.c.3.
  - (3) All standard competitions will include the cost conversion differential (i.e., 10% of personnel costs or \$10 million, whichever is less). Circular A-76 (Revised), Attachment B, ¶ D.5.c.4.<sup>18</sup>
- c. Implementing a Performance Decision. For private sector performance decisions, the CO awards a contract IAW the FAR. For agency performance decisions, the CO executes a “letter of obligation” with an agency official responsible for the commercial activity. Circular A-76 (Revised), Attachment B, ¶ D.6.f.
  - d. Contests.

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<sup>18</sup> Although the “10% or \$10 million” conversion differential does not apply in the streamlined competitions of civilian agencies, Congress requires the DOD to apply the differential in all competitions involving more than 10 civilian employees. See Department of Defense Appropriations Act for FY 2005, Pub. L. No. 108-287, § 8014(a), 118 Stat. 951, 972 (2004). This year’s Act adds a new limitation that states the contractor cannot receive an advantage for a proposal that reduces DOD costs by “not making an employer-sponsored health insurance plan available” to the workers who will perform the work under the proposal, or by “offering to such workers an employer-sponsored health benefits plan that the requires the employer to contribute less towards the premiums” than the amount paid by the DOD under chapter 89, title 5 of the United States Code. Id.

- (1) A “directly interested party” (i.e., the agency tender official, a single individual appointed by a majority of directly affected employees, a private sector offeror, or the certifying official of a public reimbursable tender) may contest certain actions in a standard competition. Circular A-76 (Revised), Attachment B, ¶ F.1.
- (2) All such challenges will now be governed by the agency appeal procedures found at FAR 33.103. Circular A-76 (Revised), Attachment B, ¶ F.1.
- (3) No party may contest any aspect of a streamlined competition. Circular A-76 (Revised), Attachment B, ¶ F.2.

e. Protests.

- (1) Shortly after OMB issued the Circular A-76 (Revised), GAO published a notice in the Federal Register requesting comments on whether the GAO should accept jurisdiction over bid protests submitted by the Agency Tender Official and/or an “agent” for affected employees. Government Accountability Office; Administrative Practices and Procedures; Bid Protest Regulations, Government Contracts, 68 Fed. Reg. 35.411 (June 13, 2003).
- (2) In April 2004, the GAO ruled that notwithstanding the changes in the Circular A-76 (Revised), the in-house competitors in public/private competitions are not offerors and, therefore, under the current language of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56 (2000), no representative of an in-house competitor is an “interested party” eligible to maintain a protest before the GAO. Dan Dufrene et al., B-293590.2 et al. (April 19, 2004).<sup>19</sup>

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<sup>19</sup> Recognizing the concerns of fairness that weigh in favor of correcting the current situation, where an unsuccessful private-sector offeror has the right to protest to the GAO, while an unsuccessful public-sector competitor does not, the Comptroller General sent a letter to Congress suggesting that Congress may wish to consider amending the CICA to provide for MEO standing. Dan Dufrene et al., B-293590.2 (April 19, 2004). The letter also suggested that any amendment to the CICA specify who would be authorized to protest on the MEO’s behalf: the ATO, affected employees (either individually or in a representative capacity), and/or employees’ union

- (3) In response, Congress included section 326 in the Ronald W. Reagan National Defense Authorization Act, 2005 (2005 NDAA), and granted ATOs limited, yet significant bid protest rights. Pub. L. No. 108-375, § 326, 118 Stat. 1811, 1848 (2004).
  - (a) Amends the CICA’s definition of “interested party” by specifying that term includes ATOs in public-private competitions involving more than sixty-five FTEs. *See* 31 U.S.C. § 3551(2).
  - (b) States that ATOs “shall file a protest” in a public-private competition at the request of a majority of the affected federal civilian employees “unless the [ATO] determines that there is no reasonable basis for the protest.” The ATO’s determination whether to file a protest “is not subject to administrative or judicial review,” however, if the ATO determines there is no reasonable basis for a protest, the ATO must notify Congress.
  - (c) Additionally, in any protest filed by an interested party in competitions involving more than sixty-five FTEs, a representative selected by a majority of the affected employees may “intervene” in the protest.
- (4) On 14 April 2005, the GAO amended its Bid Protest Regulations by revising the definition of “interested party” and “intervenor” IAW with the 2005 NDAA. 70 Fed. Reg. 19,679 (Apr. 14, 2005).

#### 4. Timeframes.

- a. Streamlined Competitions. Must be completed within 90 calendar days from “public announcement” to “performance decision,” unless the agency CSO grants an extension not to exceed 45 days. Circular A-76 (Revised), Attachment B, ¶ C.2.

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representatives. *Id.* On 18 May 2004, a bipartisan group of senators introduced legislation that would amend the CICA’s definition of “interested party” to include the ATO and any one person selected as a representative by a majority of the affected federal employees. S. 2438, 108th Cong. (2004).

- b. Standard Competitions. Must not exceed 12 months from “public announcement” to “performance decision,” unless the CSO grants a time limit waiver not to exceed 6 months. Circular A-76 (Revised), Attachment B, ¶ D.1.
- c. Preliminary Planning. Because time frames for completing competitions have been reduced, preliminary planning takes on increased importance. The new rules state that prior to public announcement (start date)<sup>20</sup> of a streamlined or standard competition, the agency must complete several preliminary planning steps to include: scoping the activities and FTEs to be competed, grouping business activities, assessing the availability of workload data, determining the incumbent activities baseline costs, establishing schedules, and appointing the various competition officials. Circular A-76 (Revised), Attachment B, ¶ A.

C. Post Competition Accountability.

- 1. Monitoring. After implementing a performance decision, the agency must monitor performance IAW with the performance periods stated in the solicitation. The CO will make option year exercise determinations IAW FAR 17.207. Circular A-76 (Revised), Attachment B, ¶¶ E.4 and 5.
- 2. Terminations for Failure to Perform. The CO must follow the cure notice and show cause notification procedures consistent with FAR Part 49 prior to issuing a notice of termination. Circular A-76 (Revised), Attachment B, ¶ E.6.

## V. CIVILIAN PERSONNEL ISSUES.

- A. Employee Consultation. By statute, the DOD must consult with affected employees. In the case of affected employees represented by a union, consultation with union representatives satisfies this requirement. 10 U.S.C. § 2467(b).

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<sup>20</sup> Recall that the DOD has a statutory requirement to notify Congress “before commencing to analyze” a commercial activity for possible change to performance by the private sector if more than 50 civilian employees perform the function. 10 U.S.C. § 2461(b).

B. Right-of-First-Refusal of Employment.

1. The CO must include the Right-of-First-Refusal of Employment clause in the solicitation. See Circular A-76 (Revised), Attachment B, ¶ D.6.f.1.b; Revised Supplemental Handbook, Part I, Chapter 3, ¶ G.4; and FAR 7.305.
2. The clause, at FAR 52.207-3, requires:
  - a. The contractor to give the government employees, who have been or will be adversely affected or separated due to the resulting contract award, the right of first refusal for employment openings under the contract in positions for which they are qualified, if that employment is consistent with post-government employment conflict of interest standards.
  - b. Within 10 days after contract award, the contracting officer must provide the contractor a list of government employees who have been or will be adversely affected or separated as a result of contract award.
  - c. Within 120 days after contract performance begins, the contractor must report to the contracting officer the names of displaced employees who are hired within 90 days after contract performance begins.

C. Right-of-First-Refusal and the Financial Conflict of Interest Laws.

1. Employees will participate in preparing the PWS and the MEO. Certain conflict of interest statutes may impact their participation, as well as, when and if they may exercise their Right-of-First Refusal.
2. Procurement Integrity Act, 41 U.S.C. § 423; FAR 3.104.
  - a. Disclosing or Obtaining Procurement Information (41 U.S.C. §§ 423(a)-(b)). These provisions apply to all federal employees, regardless of their role during a Circular A-76 competition.
  - b. Reporting Employment Contacts (41 U.S.C. § 423(c)).

- (1) FAR 3.104-1(iv) generally excludes from the scope of “personally and substantially” the following employee duties during an OMB Cir. A-76 study:
  - (a) Management studies;
  - (b) Preparation of in-house cost-estimates;
  - (c) Preparation of the MEO; or
  - (d) Furnishing data or technical support others use to develop performance standards, statements of work, or specifications.
- (2) PWS role. Consider the employee’s role. If strictly limited to furnishing data or technical support to others developing the PWS, then they are not “personally and substantially” participating. See FAR 3.104-1(iv). If the PWS role exceeds that of data and technical support, then the restriction would apply.

c. Post-Employment Restrictions (41 U.S.C. § 423 (d)). Bans certain employees for one year from accepting compensation.

- (1) Applies to contracts exceeding \$10 million, and
  - (a) Employees in any of these positions:
    - (i) Procuring contracting officer;
    - (ii) Administrative Contracting Officer;
    - (iii) Source Selection Authority;
    - (iv) Source Selection Evaluation Board member;
    - (v) Chief of Financial or Technical team;



- (vi) Program Manager; or
  - (vii) Deputy Program Manager.
- (b) Employees making these decisions:
  - (i) Award contract or subcontract exceeding \$10 million;
  - (ii) Award modification of contract or subcontract exceeding \$10 million;
  - (iii) Award task or delivery order exceeding \$10 million;
  - (iv) Establish overhead rates on contract exceeding \$10 million;
  - (v) Approve contract payments exceeding \$10 million; or
  - (vi) Pay or settle a contract claim exceeding \$10 million.
- (2) No exception exists to the one-year ban for offers of employment pursuant to the Right-of-First-Refusal. Thus, employees performing any of the listed duties or making the listed decisions on a cost comparison resulting in a contract exceeding \$10 million are barred for one year after performing such duties from accepting compensation/employment opportunities from the contractor via the Right-of-First-Refusal.
- 3. Financial Conflicts of Interest, 18 U.S.C. § 208. Prohibits officers and civilian employees from participating personally and substantially in a “particular matter” affecting the officer or employee’s personal or imputed financial interests.

- a. Cost comparisons conducted under OMB Cir. A-76 are “particular matters” under 18 U.S.C. § 208.
  - b. Whether 18 U.S.C. § 208 applies to officers and civilian employees preparing a PWS or MEO depends on whether the participation will have a “direct and predictable” effect on their financial interests. This determination is very fact specific.
- 4. Representational Ban, 18 U.S.C. § 207. Prohibits individuals who personally and substantially participated in, or were responsible for, a particular matter involving specific parties while employed by the government from switching sides and representing any party back to the government on the same matter. The restrictions in 18 U.S.C. § 207 do not prohibit employment; they only prohibit communications and appearances with the “intent to influence.”
  - a. The ban may be lifetime, for two years, or for one year, depending on the employee’s involvement in the matter.
  - b. Whether 18 U.S.C. § 207 applies to employees preparing a PWS or MEO depends on whether the cost comparison has progressed to the point where it involves “specific parties.”
  - c. Even if 18 U.S.C. § 207 does apply to these employees, it would not operate as a bar to the Right-of-First-Refusal. The statute only prohibits representational activity; it does not bar behind-the-scenes advice.

## **VI. HOUSING PRIVATIZATION.**

- A. Generally. Privatization involves the process of changing a federal government entity or enterprise to private or other non-federal control and ownership. Unlike competitive sourcing, privatization involves a transfer of ownership and not just a transfer of performance.

- B. Authority. 10 U.S.C. §§ 2871-85 provides permanent authority for military housing privatization.<sup>21</sup>
1. This authority applies to family housing units on or near military installations within the United States and military unaccompanied housing units on or near installations within the United States.
  2. Service Secretaries may use any authority or combination of authorities to provide for acquisition or construction by private persons. Authorities include:
    - a. Direct loans and loan guarantees to private entities.
    - b. Build/lease authority.
    - c. Equity and creditor investments in private entities undertaking projects for the acquisition or construction of housing units (up to a specified percentage of capital cost). Such investments require a collateral agreement to ensure that a suitable preference will be given to military members.
    - d. Rental guarantees.
    - e. Differential lease payments.
    - f. Conveyance or lease of existing properties and facilities to private entities.
  3. Establishment of Department of Defense housing funds.
    - a. The Department of Defense Family Housing Improvement Fund.
    - b. The Department of Defense Military Unaccompanied Housing Improvement Fund.

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<sup>21</sup> Originally granted in 1996 as “temporary” legislation, this authority was made permanent by the FY 2005 National Defense Authorization Act. Pub. L. No. 108-375, § 2805, 115 Stat. 1012 (2005).

C. Implementation.

1. The service conveys ownership of existing housing units, and leases the land upon which the units reside for up to 50 years.
2. The consideration received for the sale is the contractual agreement to renovate, manage, and maintain existing family housing units, as well as construct, manage, and maintain new units.
3. The contractual agreement may include provisions regarding:
  - a. The amount of rent the contractor may charge military occupants (rent control).
  - b. The manner in which soldiers will make payment (allotment).
  - c. Rental deposits.
  - d. Loan guarantees to the contractor in the event of a base closure or realignment.
  - e. Whether soldiers are required to live there.
  - f. The circumstances under which the contractor may lease units to nonmilitary occupants.

D. Issues and Concerns.<sup>22</sup>

1. Making the transition positive for occupants; including keeping residents informed during the process.
2. Loss of control over family housing.

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<sup>22</sup> See Government Accountability Office, Military Housing: Management Improvements Needed As Privatization Pace Quickens, Report No. GAO-02-624 (June 2002); Government Accountability Office, Military Housing: Continued Concerns in Implementing the Privatization Initiative, NSIAD-00-71 (March 30, 2000); Government Accountability Office, Military Housing: Privatization Off to a Slow Start and Continued Management Attention Needed, Report No. GAO/NSIAD-98-178 (July 17, 1998).

3. The effect of long-term agreements.
  - a. Future of installation as a potential candidate for housing privatization.
    - (1) DOD must determine if base a candidate for closure.
    - (2) If not, then DOD must predict its future mission, military population, future housing availability and prices in the local community, and housing needs.
  - b. Potential for poor performance or nonperformance by contractors.
    - (1) Concerns about whether contractors will perform repairs, maintenance, and improvements in accordance with agreements. Despite safeguards in agreements, enforcing the agreements might be difficult, time-consuming, and costly.
    - (2) Potential for a decline in the value of property towards the end of the lease might equal decline in service and thus quality of life for military member.
4. Effect on federal employees.
  - a. The privatization of housing will result in the elimination of those government employee positions that support family housing.
  - b. Privatization is not subject to Circular A-76.
5. Prospect of civilians living on base.
  - a. Civilians allowed to rent units not rented by military families.
  - b. This prospect raises some issues, such as security concerns and law enforcement roles.

## **VII. UTILITIES PRIVATIZATION.**

- A. Authority. 10 U.S.C. § 2688 (originally enacted as part of the FY 1998 National Defense Authorization Act) permits the service secretaries to convey all or part of a utility system to a municipal, private, regional, district, or cooperative utility company. This permanent legislation supplements several specific land conveyances involving utilities authorized in previous National Defense Authorization Acts.
- B. Implementation.
  - 1. In 1998, DOD set a goal of privatizing all utility systems (water, wastewater, electric, and natural gas) by 30 September 2003, except those needed for unique mission/security reasons or when privatization is uneconomical. Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, et al., subject: Defense Reform Initiative Directive (DRID) #49—Privatizing Utility Systems (23 Dec. 1998).
  - 2. In October 2002, DOD revised its goal and replaced DRID #49 with updated guidance. Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, et al., subject: Revised Guidance for the Utilities Privatization Program (9 Oct. 2002) [hereinafter Revised Guidance Memo]. The Revised Guidance Memo establishes 30 September 2005 as the date by which “Defense Components shall complete a privatization evaluation of each system at every Active, Reserve, and National Guard installation, within the United States and overseas, that is not designated for closure under a base closure law.” In addition to revising the milestones for utilities privatization, the Revised Guidance Memo addresses:
    - a. updated guidance concerning the issuance of solicitations and the source selection considerations in utilities privatization;
    - b. DOD’s position concerning the applicability of state utility laws and regulations to the acquisition and conveyance of the Government’s utility systems;

- c. new instruction on conducting the economic analysis, including a class deviation from the cost principle at FAR 31.205-20 authorized by DOD for “utilities privatization contracts under which previously Government-owned utility systems are conveyed by a Military Department or Defense Agency to a contractor;” and
  - d. the authority granted the Service Secretaries to include “reversionary clauses” in transaction documents to provide for ownership to revert to the Government in the event of default or abandonment by the contractor.
- 3. Requests for exemption from utility systems privatization, based on unique mission or safety reasons or where privatization is determined to be uneconomical, must be approved by the Service Secretary.
- 4. Agencies must use competitive procedures to sell (privatize) utility systems and to contract for receipt of utility services. 10 U.S.C. § 2688(b). DOD may enter into 50-year contracts for utility service when conveyance of the utility system is included. 10 U.S.C. § 2688(c)(3).
- 5. Any consideration received for the conveyance of the utility system may be accepted as a lump sum payment, or a reduction in charges for future utility services. If the consideration is taken as a lump sum, then payment shall be credited at the election of the Secretary concerned for utility services, energy savings projects, or utility system improvements. If the consideration is taken as a credit against future utility services, then the time period for reduction in charges for services shall not be longer than the base contract period. 10 U.S.C. § 2688(c).
- 6. Installations may, with Secretary approval, transfer land with a utility system privatization. 10 U.S.C. § 2688(i)(2); U.S. Dep’t of Army, Privatization of Army Utility Systems—Update 1 Brochure (March 2000). In some instances (environmental reasons) installations may want to transfer the land under wastewater treatment plants.
- 7. Installations must notify Congress of any utility system privatization. The notice must include an analysis demonstrating that the long-term economic benefit of privatization exceeds the long-term economic cost, and that the conveyance will reduce the long-term costs to the DOD concerned for utility services provided by the subject utility system. The installation must also wait 21 days after providing such congressional notice. 10 U.S.C. § 2688(e).

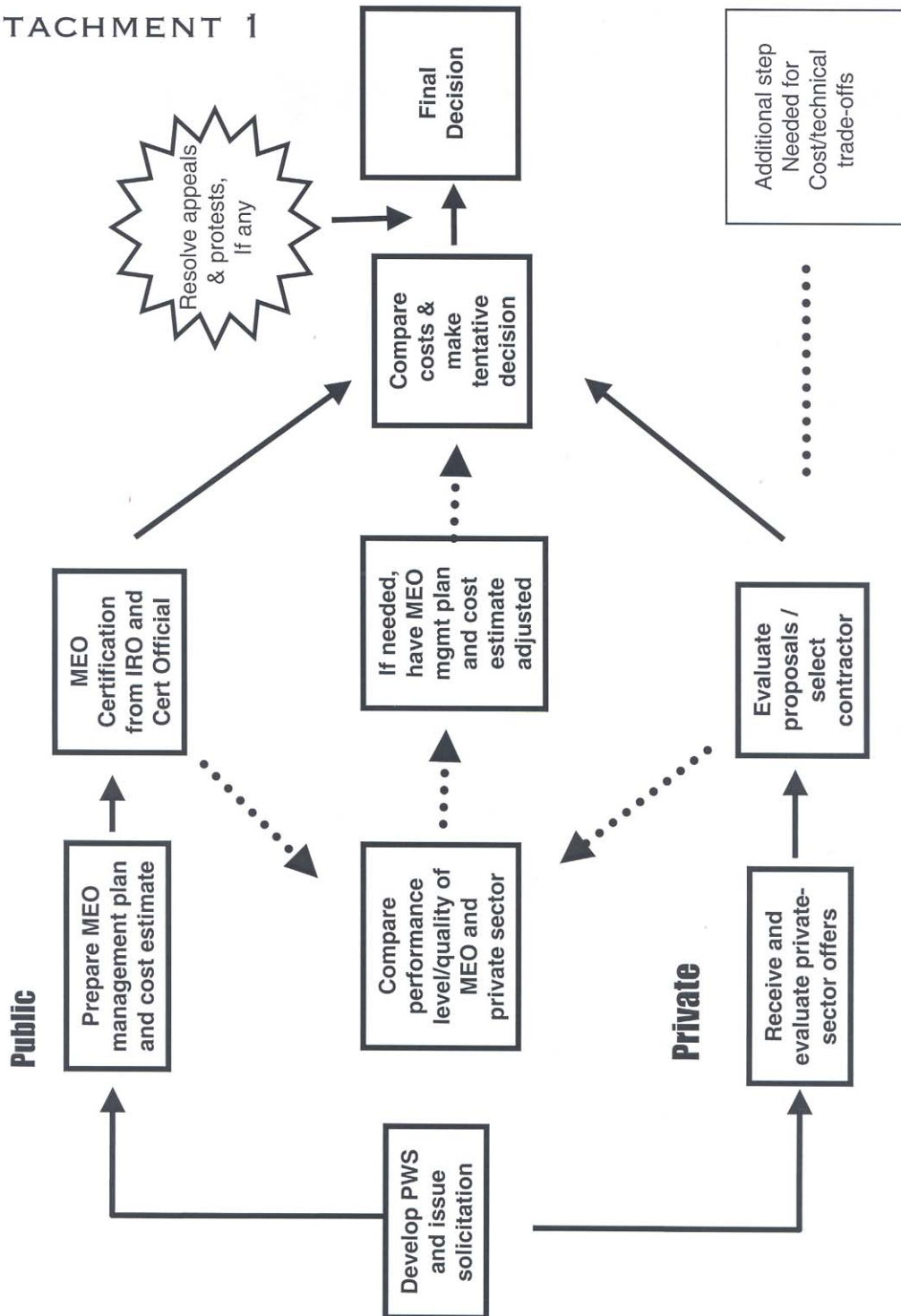
C. Issues and Concerns.

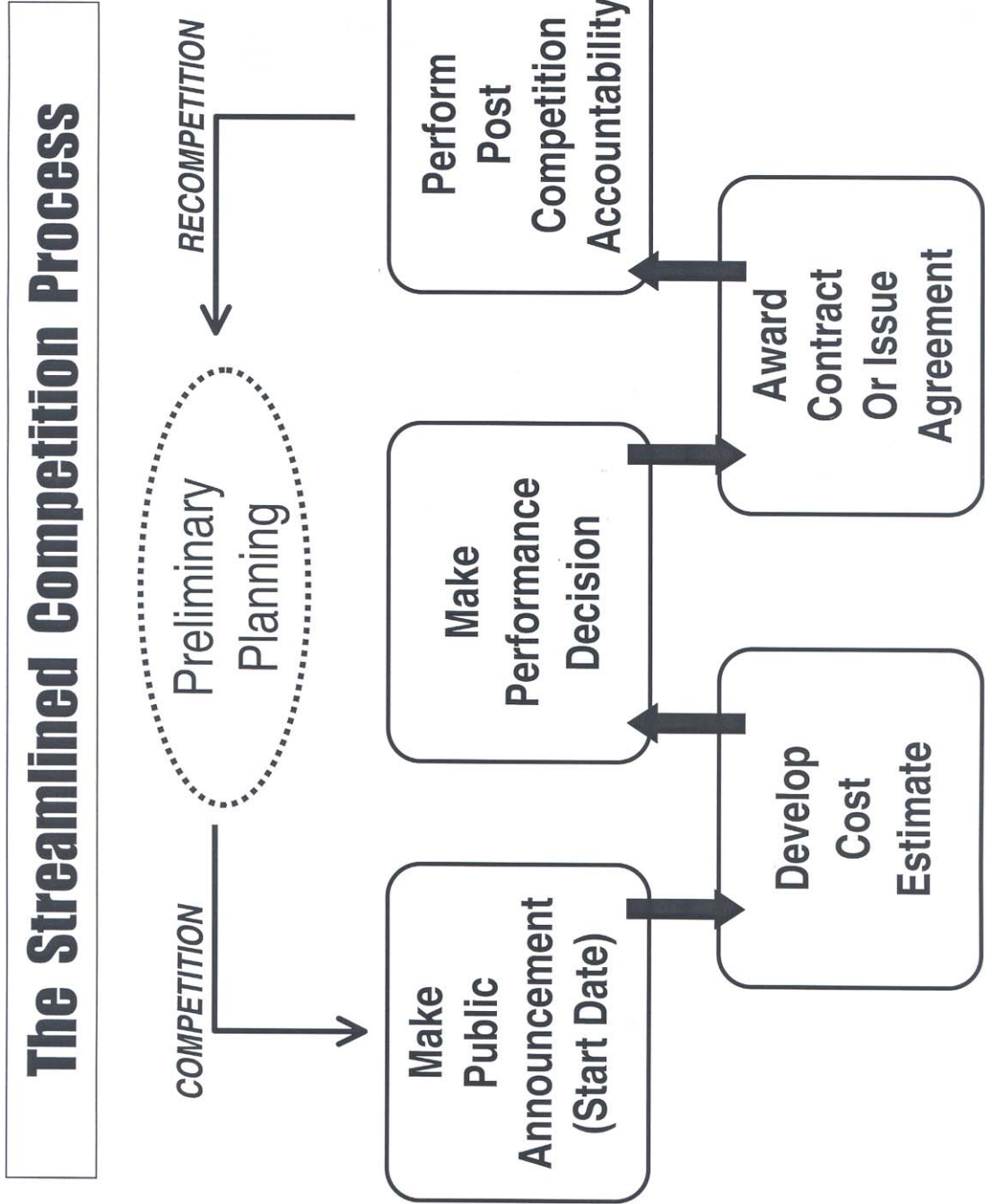
1. Effect of State Law and Regulation. State utility laws and regulations, the application of which would result in sole-source contracting with the company holding the local utility franchise at each installation, do not apply in federal utility privatization cases. See Virginia Electric and Power Company; Baltimore Gas & Electric, B-285209, B-285209.2 (Aug. 2, 2000) 2000 U.S. Comp. Gen. LEXIS 125 (holding 10 U.S.C. § 2688 does not contain an express and unequivocal waiver of federal sovereign immunity); see also Baltimore Gas & Electric v. United States, US District Court, District of Maryland, No AMD 00-2599 Mar. 12, 2001 (following the earlier GAO decision and finding no requirement for the Army to use sole-source procedures for the conveyance of utilities distribution systems and procurement of utilities distribution services). The DOD General Counsel has issued an opinion that reached the same conclusion. Dep't. of Def. General Counsel, The Role of State Laws and Regulations in Utility Privatization (Feb. 24, 2000).
2. Utility Bundling. An agency may employ restrictive provisions or conditions only to the extent necessary to satisfy the agency's needs. Bundled utility contracts, which not only achieve significant cost savings, but also ensure the actual privatization of all utility systems, are proper. Virginia Electric and Power Company; Baltimore Gas & Electric, B-285209, B-285209.2 (Aug. 2, 2000) 2000 U.S. Comp. Gen. LEXIS 125.
3. Reversionary Clauses. The contractual agreement must protect the government's interests in the event of a default termination. The use of reversionary clauses, which revoke the conveyance of the utility system, are an option. Revised Guidance Memo, supra.

## VIII. CONCLUSION.

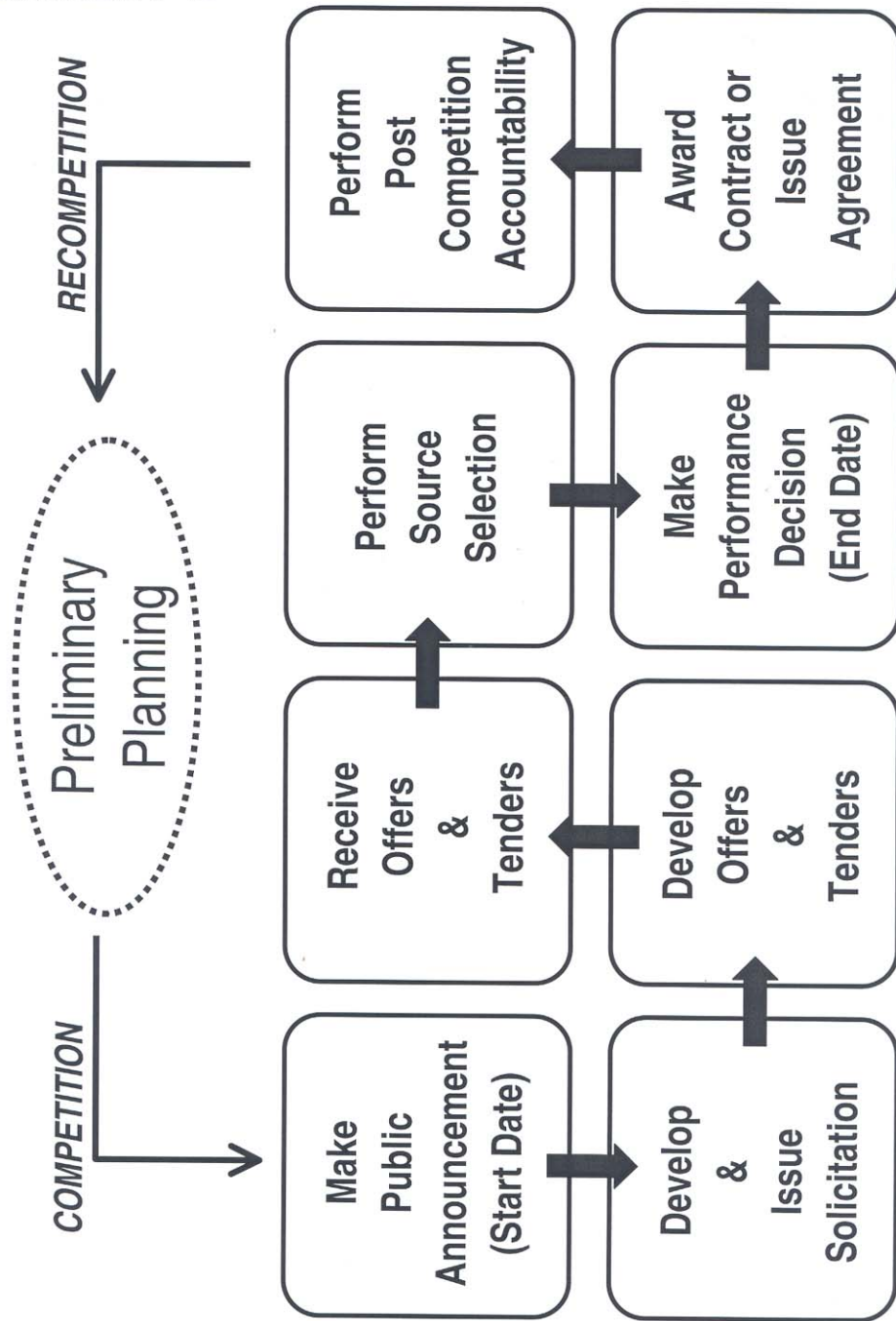


# ATTACHMENT 1





# The Standard Competition Process



## **CHAPTER 12**

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## **CHAPTER 12**

### **BID PROTESTS**

*"The laws and regulations that govern contracting with the federal government are designed to ensure that federal procurements are conducted fairly and, whenever possible, in a way that maximizes competition."*

*OFFICE OF GENERAL COUNSEL, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE,  
BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE (6th ed. 1996)*

#### **I. INTRODUCTION.**

- A. Background.** The protest system established by the Competition in Contracting Act of 1984 (CICA) and implemented by Government Accountability Office (GAO) Bid Protest Regulations is designed to provide for the expeditious resolution of protests with only minimal disruption to the procurement process. DataVault Corp., B-249054, Aug. 27, 1992, 92-2 CPD ¶ 133. See FAR Subpart 33.201.
- B. Jurisdiction.** Multiple fora. An unsuccessful offeror may protest to the agency, the GAO, or the United States Court of Federal Claims (COFC). See Appendix.
- C. Remedies.**
  - 1. Generally, protest fora do not direct the award of a contract and may not award lost profits.
  - 2. Whether the filing of a protest to challenge a contract solicitation or an award creates an automatic stay or suspension of any work on the procurement is of critical importance and varies from forum to forum.

MAJ Steven R. Patoir  
54th Graduate Course  
Fall 2005

## II. AGENCY PROTESTS.

### A. Authority.

1. Agency protests are protests filed<sup>1</sup> directly with the contracting officer or other cognizant government official within the agency. These protests are governed by FAR 33.103, AFARS 33.103, NAPS 5233.103, AFFARS 5333.102 and 5333.103.
2. Contracting officers **must consider and seek legal advice** regarding all protests filed with the agency. FAR 33.102(a).

**B. Procedures.** FAR 33.103. In late 1995, President Clinton issued an Executive Order directing all executive agencies to establish alternative disputes resolution (ADR) procedures for bid protests. The order directs agency heads to create a system that, “to the maximum extent possible,” will allow for the “inexpensive, informal, procedurally simple, and expeditious resolution of protests.” FAR 33.103 implements this Order. Exec. Order No. 12,979, 60 Fed. Reg. 55,171 (1995).

1. Open and frank discussions. Prior to the submission of a protest, all parties shall use “their best efforts” to resolve issues and concerns raised by an “interested party” **at the contracting officer level**. “Best efforts” include conducting “open and frank discussions” among the parties.
2. Objectives. FAR 33.103(d). The goal of an effective agency protest system is to:
  - a. resolve agency protests effectively;
  - b. help build confidence in the federal acquisition system; and

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<sup>1</sup>FAR 33.101 defines “filed” to mean:

[t]he complete receipt of any document by an agency before its close of business. Documents received after close of business are considered filed as of the next day. Unless otherwise stated, the agency’s close of business is presumed to be 4:30 p.m., local time.

- c. reduce protests to the GAO and other judicial protest fora.
- 3. Protesters are **not required** to exhaust agency administrative remedies.
- 4. Procedures tend to be informal and flexible.
  - a. Protests must be clear and concise. Failure to submit a coherent protest may be grounds for dismissal. FAR 33.103(d)(1).
  - b. “Interested parties” may request review at a “level above the contracting officer” of any decision by the contracting officer that allegedly violated applicable statute or regulation and, thus, prejudiced the offeror. FAR 33.103(d)(4).
- 5. Timing of Protests.
  - a. Pre-award protests, to include protests challenging the propriety of a solicitation, must be filed **prior to bid opening or the date for receipt of proposals**.
  - b. In all other cases, the contractor must file its protest to the agency **within 10 days of when the protester knew or should have known of the bases for the protest**. For “significant issues” raised by the protester, however, the agency has the discretion to consider the merits of a protest that is otherwise untimely. FAR 33.103(e).
- 6. Suspension of Procurement.
  - a. Pre-Award Stay. The contracting officer **shall not** make award if an agency protest is filed before award. FAR 33.103(f)(1) imposes an administrative stay of the contract award.
    - (1) The agency may override the stay if one of the following applies:



- (a) contract award is justified in light of “urgent and compelling” reasons; or
    - (b) a prompt award is in “the best interests of the Government.”
  - (2) The override decision must be made in writing and then approved by an agency official “at a level above the contracting officer” or another official pursuant to agency procedures. FAR 33.103(f)(1).
  - (3) If the contracting officer elects to withhold award, he must inform all interested parties of that decision. If appropriate, the contracting officer should obtain extensions of bid/proposal acceptance times from the offerors. If the contracting officer cannot obtain extensions, he should consider an override of the stay and proceed with making contract award. FAR 33.103(f)(2).
- b. Post-Award Stay. If the agency receives a protest within 10 days of contract award or 5 days of a “required” debriefing date offered by the agency,<sup>2</sup> the contracting officer shall suspend contract performance immediately. FAR 33.103(f)(3).
- (1) The agency may override the stay if one of the following applies:
    - (a) contract performance is justified in light of “urgent and compelling” reasons; or
    - (b) contract performance is in “the best interests of the Government.”
  - (2) The override determination must be made in writing and then approved by an agency official “at a level above the contracting officer” or another official pursuant to agency procedures. FAR 33.103(f)(3).

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<sup>2</sup>See FAR 15.505 and FAR 15.506.

**C. Processing Protests.**

1. Contractors generally present protests to the contracting officer; but they may also request an independent review of their protest at a level above the contracting officer, in accordance with agency procedures. Solicitations should advise offerors of this option. FAR 33.103(d)(4).
  - a. Agency procedures shall inform the protester whether this independent review is an alternative to consideration by the contracting officer or as an “appeal” to a contracting officer’s protest decision.
  - b. Agencies shall designate the official who will conduct this independent review. The official need not be in the supervisory chain of the contracting officer. However, “when practicable,” the official designated to conduct the independent review “should” not have previous “personal involvement” in the procurement.
  - c. **NOTE:** This “independent review” of the contracting officer’s initial protest decision, if offered by the agency, does **NOT** extend GAO’s timeliness requirements.
2. The agencies “shall make their best efforts” to resolve agency protests within 35 days of filing. FAR 33.103(g).
3. Discovery. To the extent permitted by law and regulation, the agency and the protester may exchange information relevant to the protest. FAR 33.103(g).
4. The agency decision shall be “well reasoned” and “provide sufficient factual detail explaining the agency position.” The agency must provide the protester a written copy of the decision via a method that provides evidence of receipt. FAR 33.103(h).

**D. Remedies. FAR 33.102.**

1. Failure to Comply with Applicable Law or Regulation. FAR 33.102(b). If the agency head determines that, as a result of a protest, a solicitation, proposed award, or award is improper, he may:

- a. take any action that the GAO could have “recommended,” had the contractor filed the protest with the GAO; and,
  - b. award costs to the protester for prosecution of the protest.
2. **Misrepresentation by Awardee.** If, as a result of awardee’s **intentional** or **negligent** misstatement, misrepresentation, or miscertification, a post-award protest is sustained, the agency head may require the awardee to reimburse the government’s costs associated with the protest. The government may recover this debt by offsetting the amount against **any** payment due the awardee under **any** contract between the awardee and the government.<sup>3</sup> This provision also applies to GAO protests. FAR 33.102(b)(3).
3. **Follow-On Protest.** If unhappy with the agency decision, the protester may file its protest with either the GAO or COFC (see Appendix). If the vendor elects to proceed to the GAO, it must file its protest within 10 days of receiving notice of the agency’s **initial adverse action**.<sup>4</sup> 4 C.F.R. § 21.2(a)(3) (2000).

### III. GOVERNMENT ACCOUNTABILITY OFFICE (GAO).

- A. **Statutory Authority.** The Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56, is the current statutory authority for GAO bid protests of federal agency procurements. 31 U.S.C. § 3533 authorizes GAO to issue implementing regulations.

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<sup>3</sup>In determining the liability of the awardee, the contracting officer shall take into consideration "the amount of the debt, the degree of fault, and the costs of collection." FAR 33.102(b)(3)(ii).

<sup>4</sup>In its "White Book," the GAO advises that it applies a "straightforward" interpretation of what constitutes notice of adverse agency action. Specific examples include: bid opening; receipt of proposals; rejection of a bid or proposal; or contract award. OFFICE OF GENERAL COUNSEL, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE 13 (6th ed. 1996). **The reader can obtain a free copy of this booklet by calling (202) 512-6061 or by accessing the GAO Internet Homepage at: <http://www.gao.gov> and requesting publication # OGC-96-24.**

**B. Regulatory Authority.** The GAO’s bid protest rules are set forth at 4 C.F.R. Part 21. FAR provisions governing GAO bid protests are at FAR 33.104. Agency FAR supplements contain regulatory procedures for managing GAO protests. See generally DFARS 233.1; AFARS 5133.104; AFFARS 5333.104; NAPS 5233.104; DLAAR 33.104.

**C. Who May Protest?**

1. 31 U.S.C. § 3551(1) and 4 C.F.R. § 21.1(a) (2000) provide that an “interested party” may protest to the GAO.
2. An “**interested party**” is “an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.” 31 U.S.C § 3551(2); 4 C.F.R. § 21.0(a) (2000).
  - a. **Before** bid opening or proposal submission due date, a protester must be a **prospective bidder or offeror with a direct economic interest**. A prospective bidder or offeror is one who has expressed an interest in competing. Total Procurement Servs., Inc., B-272343, Aug. 29, 1996, 96-2 CPD ¶ 92; D.J. Findley, Inc., B-221096, Feb. 3, 1986, 86-1 CPD ¶ 121.
  - b. **After** bid opening or the submission of proposals, a protester must be an **actual bidder or offeror with a direct economic interest**.

- (1) A bidder or offeror must be “**next-in-line**” for award. If a protester cannot receive award if it prevails on the merits, it is not an interested party. International Data Prods., Corp., B-274654, Dec. 26, 1996, 97-1 CPD ¶ 34 (protesters rated eighth and ninth in overall technical merit were interested parties); Comspace Corp., B-274037, Nov. 14, 1996, 96-2 CPD ¶ 186 (contractor not in line for award where electronic quote not properly transmitted); Ogden Support Servs., Inc., B-270354.2, Oct. 29, 1996, 97-1 CPD ¶ 135 (protester not an interested party where an intervening offeror has a higher technical score and a lower cost); Recon Optical, Inc., B-272239, July 17, 1996, 96-2 CPD ¶ 21 (recipients of multiple award contracts may not protest the other’s award); Watkins Sec. Agency, Inc., B-248309, Aug. 14, 1992, 92-2 CPD ¶ 108 (highest priced of three technically equal bidders was not in line for award).
- (2) A high-priced bidder may be able to demonstrate that all lower-priced bidders would be ineligible for award. Professional Medical Prods., Inc., B-231743, July 1, 1988, 88-2 CPD ¶ 2.
- (3) In a “best value” or negotiated procurement, the GAO determines whether a protester is an interested party by examining the probable result if the protest is successful. Government Tech. Servs., Inc., B-258082, Sept. 2, 1994, 94-2 BCA ¶ 93 (protester not an interested party where it failed to challenge higher-ranked intervening offers); Rome Research Corp., B-245797, Sept. 22, 1992, 92-2 CPD ¶ 194.
- (4) An actual bidder, not in-line for award, is an interested party if it would **regain the opportunity to compete** if the GAO sustains its protest. This occurs if the GAO could recommend resolicitation. Teltara, Inc., B-245806, Jan. 30, 1992, 92-1 CPD ¶ 128 (11<sup>th</sup> low bidder protested the adequacy of the solicitation’s provisions concerning a prior collective bargaining agreement; remedy might be resolicitation); Remtech, Inc., B-240402, Jan. 4, 1991, 91-1 CPD ¶ 35 (protest by nonresponsive second low bidder challenged IFB as unduly restrictive; interested party because remedy is resolicitation).

3. **Intervenors.** Immediately after receipt of the protest notice, the agency must notify awardee (post-award protest) or all offerors who have a “reasonable prospect” of receiving award if the protest is denied (pre-award protest). 4 C.F.R. § 21.0(b), § 21.3(a) (2000).

#### **D. What May Be Protested?**

1. The protester must allege a violation of a procurement statute or regulation. 31 U.S.C. § 3552. The GAO will also review allegations of unreasonable agency actions. S.D.M. Supply, Inc., B-271492, June 26, 1996, 96-1 CPD ¶ 288 (simplified acquisition using defective FACNET system failed to promote competition “to the maximum extent practicable” in violation of CICA). This includes the termination of a contract where the protest alleges the government’s termination was based upon improprieties associated with contract award (sometimes referred to as a “reverse protest”). 4 C.F.R. § 21.1(a) (2000); Severn Cos., B-275717.2, Apr. 28, 1997, 97-1 CPD ¶ 181.
2. The GAO generally will NOT consider protests on the following matters:
  - a. **Contract Administration.** 4 C.F.R. § 21.5(a) (2000). Health Care Waste Servs., B-266302, Jan. 19, 1996, 96-1 CPD ¶ 13 (registration or licensing requirement a performance obligation and not one of responsibility); JA & Assocs., B-256280, Aug. 19, 1994, 95-1 CPD ¶ 136 (decision to novate contract to another firm rather than recompet); Caltech Serv. Corp., B-240726, Jan. 22, 1992, 92-1 CPD ¶ 94 (modification of contract unless it is a cardinal change); Casecraft, Inc., B-226796, June 30, 1987, 87-1 CPD ¶ 647 (decision to terminate a contract for default); but see Marvin J. Perry & Assocs., B-277684, Nov. 4, 1997, 97-2 CPD ¶ 128 (GAO asserts jurisdiction over agency acceptance of different quality office furniture that was shipped by mistake); Sippican, Inc., B-257047, Nov. 13, 1995, 95-2 CPD ¶ 220 (GAO will review agency exercise of contract option).
  - b. **Small Business Size and Industrial Classification Determinations.** 4 C.F.R. § 21.5(b)(1) (2000). Challenges to size or status of small businesses are left to exclusive review by the Small Business Administration. Lawyers Advantage Title Group, Inc., B-275946, Apr. 17, 1997, 97-1 CPD ¶ 143; Columbia Research Corp., B-247073, June 4, 1992, 92-1 CPD ¶ 492.

- c. **Small Business Certificate of Competency (COC) Determinations.** 4 C.F.R. § 21.5(b)(2) (2000). **New GAO Final Rule:** Expands the theories available (bad faith or failure to consider vital information) to potential protestors by permitting protests of SBA's failure to follow its own regulations in connection with a COC determination, even in instances where SBA acted in good faith and may have considered all available information. See 67 Fed. Reg. 251, Dec. 31, 2002 at 79835.
- d. **Procurements Under Section 8(a) of the Small Business Act** (i.e., small disadvantaged business contracts). The GAO will review a decision to place a procurement under the 8(a) program only for possible bad faith by agency officials or a violation of applicable law or regulation. 4 C.F.R. § 21.5(b)(3) (2000). See Grace Indus., Inc., B-274378, Nov. 8, 1996, 96-2 CPD ¶ 178. See also Security Consultants Group, Inc., B-276405.2, June. 9, 1997, 97-1 CPD ¶ 207 (protest sustained where agency failed to provide complete and accurate information of all vendors eligible for an 8(a) award).
- e. **Affirmative Responsibility Determinations.** 4 C.F.R. § 21.5(c) (2000); Imaging Equip. Servs., Inc., B-247197, Jan. 13, 1992, 92-1 CPD ¶ 62.
- (1) Exception: Where solicitation includes definitive responsibility criteria. King-Fisher Co., B-236687, Feb. 12, 1990, 90-1 CPD ¶ 177.
- (2) Exception: Where protester alleges fraud or bad faith. HLJ Management Group, Inc., B-225843, Mar. 24, 1989, 89-1 CPD ¶ 299. But See Impresa Construzione Geom. Domenico Garufi v. U.S., 238 F.3d 1324 (Fed. Cir. 2001) (the CAFC held that the COFC's standard of review for responsibility determinations would be those set forth in the Administrative Procedures Act, i.e., would include one requiring lack of rational basis or a procurement procedure involving a violation of a statute or regulation).

- (3) **New GAO Final Rule:** In order to align GAO's rules with those followed in the federal circuit, GAO issued a final rule, effective January 1, 2003, which expanded GAO's review of affirmative responsibility determinations to include protests where there is evidence that the contracting officer failed to consider available relevant information, or otherwise violated a pertinent statute or regulation. See 67 Fed. Reg. 251, Dec. 31, 2002 at 79,835-36.
- f. **Procurement Integrity Act Violations.** The protester must first report information supporting allegations involving violations of the Procurement Integrity Act to the agency within 14 days after the protester first discovered the possible violation. 4 C.F.R. § 21.5(d) (2000); 41 U.S.C. § 423. See, e.g., SRS Techs., B-277366, July 30, 1997, 97-2 CPD ¶ 42.
- g. **Subcontractor Protests.** The GAO will not consider subcontractor protests unless requested to do so by the procuring agency. 4 C.F.R. § 21.5(h) (2000). See RGB Display Corporation, B-284699, May 17, 2000, 2000 CPD ¶ 80. See also Compugen, Ltd., B-261769, Sept. 5, 1995, 95-2 CPD ¶ 103. However, the GAO will review subcontract procurements where the subcontract is "by" the government. See supra RGB Display Corporation (subcontract procurement is "by" the government where agency handles substantially all the substantive aspects of the procurement and the prime contractor acts merely as a conduit for the government).
- h. **Procurements by Non-Federal Agencies** (e.g., United States Postal Service, Federal Deposit Insurance Corporation (FDIC), nonappropriated fund activities [NAFIs]). 4 C.F.R. § 21.5(g) (2000). The GAO will consider a protest involving a non-federal agency if the agency involved has agreed in writing to have the protest decided by the GAO. 4 C.F.R. § 21.13 (2000).



- i. **Judicial Proceedings.** 4 C.F.R. §21.11 (2000). The GAO will not hear protests that are the subject of pending federal court litigation unless requested by the court. SRS Techs., B-254425, May 11, 1995, 95-1 CPD ¶ 239; Snowblast-Sicard, Inc., B-230983, Aug. 30, 1989, 89-2 CPD ¶ 190. The GAO also will not hear a protest that has been finally adjudicated, e.g., dismissed with prejudice. Cecile Indus., Inc., B-211475, Sept. 23, 1983, 83-2 CPD ¶ 367.
- j. **Task and Delivery Orders.** The GAO may not hear protests associated with the placement of a task or delivery order except when the order “increases the scope, period, or maximum value” of the underlying contract. 10 U.S.C. § 2304(c). See, e.g., Military Agency Services Pty., Ltd., B-290414, Aug. 1, 2003, 2002 CPD ¶ 130. The GAO, however, has held that it has protest jurisdiction over task and delivery orders placed under Federal Supply Schedule (FSS) contracts. Severn Co., Inc., B-275717.2, Apr. 28, 1997, 97-1 CPD ¶ 181 at 2-3, n.1. Additionally, the GAO will hear cases involving the “downselect” of multiple awardees, if that determination is implemented by the issuance of task and delivery orders. See Electro-Voice, Inc., B-278319; Jan. 15, 1998, 98-1 CPD ¶ 23. See also Teledyne-Commodore, LLC - - Reconsideration, B-278408.4, Nov. 23, 1998, 98-2 CPD ¶ 121.
- k. **Debarment & Suspension Issues.** The GAO announced will no longer review protests that an agency improperly suspended or debarred a contractor. See Shinwha Electronics, B-290603, Sept. 3, 2002, 2002 CPD ¶ 154.

3. What Is a Procurement?

- a. A procurement of property or services by a federal agency. 31 U.S.C. § 3551. New York Tel. Co., B-236023, Nov. 7, 1989, 89-2 CPD ¶ 435 (solicitation to install pay phones is an acquisition of a service). The transaction, however, must relate to the agency's mission or result in a benefit to the government. Maritime Global Bank Group, B-272552, Aug. 13, 1996, 96-2 CPD ¶ 62 (Navy agreement with a bank to provide on-base banking services not a procurement). See also Starfleet Marine Transportation, Inc., B-290181, July 5, 2002, 2002 CPD ¶ 113 (GAO holding that it had jurisdiction of a mixed transaction involving both the "sale" of a business opportunity and the procurement of services); Government of Hartford County, Md., B-283259, B-283259.3, Oct. 28, 1999, 99-2 CPD ¶ 81.
- b. Sales of government property are excluded. Fifeco, B-246925, Dec. 11, 1991, 91-2 CPD ¶ 534 (sale of property by FHA not a procurement of property or services); Columbia Communications Corp., B-236904, Sept. 18, 1989, 89-2 CPD ¶ 242 (GAO declined to review a sale of satellite communications services). The GAO will consider protests involving such sales, however, if the agency involved has agreed in writing to allow GAO to decide the dispute. 4 C.F.R. § 21.13(a) (2000); Assets Recovery Sys., Inc., B-275332, Feb. 10, 1997, 97-1 CPD ¶ 67. See also Catholic University of America v. United States, 49 Fed. Cl. 795 (2001) (COFC holding that the ADRA's amendment to the Tucker Act broadened its scope of post-award protests to include solicitation of government assets).
- c. The GAO has also considered a protest despite the lack of a solicitation or a contract when the agency held "extensive discussions" with a firm and then decided not to issue a solicitation. Health Servs. Mktg. & Dev. Co., B-241830, Mar. 5, 1991, 91-1 CPD ¶ 247. Accord RJP Ltd., B-246678, Mar. 27, 1992, 92-1 CPD ¶ 310.
- d. A "Federal Agency" includes executive, legislative, or judicial branch agencies. 31 U.S.C. § 3551(3) (specifically refers to the definition in the Federal Property and Administrative Services Act of 1949 at 40 U.S.C. § 472); 4 C.F.R. § 21.0(c) (2000). However, it excludes:

- (1) The Senate, House of Representatives, the Architect of the Capitol, and activities under his direction. 40 U.S.C. § 472(b); 4 C.F.R. § 21.0(c) (2000). Court Reporting Servs., Inc., B-259492, Dec. 12, 1994, 94-2 CPD ¶ 236.
  - (2) Government corporations identified in 31 U.S.C. § 9101 that are only partially owned by the United States, e.g., FDIC. 31 U.S.C. § 3501; Cablelink, B-250066, Aug. 28, 1992, 92-2 CPD ¶ 135. This exclusion does not apply to wholly government-owned corporations, e.g., TVA. See Kennan Auction Co., B-248965, June 9, 1992, 92-1 CPD ¶ 503 (Resolution Trust Corporation); Monarch Water Sys., Inc., B-218441, Aug. 8, 1985, 85-2 CPD ¶ 146. See also 4 C.F.R. § 21.5(g) (2000).
  - (3) The United States Postal Service (USPS). 4 C.F.R. § 21.5(g) (2000). Not in GAO. But See Emery WorldWide Airlines, Inc. v. Federal Express Corp., 264 F.3d 1071 (2001) (the **Court of Appeals for the Federal Circuit** held that the USPS was a federal agency as specified by the Administrative Dispute Resolution Act of 1996, not federal procurement law, therefore the Postal Service is not exempt from the court's bid protest jurisdiction as it is from GAO's).
- e. Generally, the GAO does not view procurements by nonappropriated fund instrumentalities (NAFIs) as "agency procurements." 4 C.F.R. § 21.5(g) (2000). The Brunswick Bowling & Billiards Corp., B-224280, Sept. 12, 1986, 86-2 CPD ¶ 295.
- (1) The GAO **will** consider procurements conducted by federal agencies (i.e., processed by an agency contracting officer) on behalf of a NAFI, even if no appropriated funds are to be obligated. Premier Vending, Inc., B-256560, July 5, 1994, 94-2 CPD ¶ 8; Americable Int'l, Inc., B-251614, Apr. 20, 1993, 93-1 CPD ¶ 336.

- (2) The GAO will consider a protest involving a NAFI-conducted procurement if there is evidence of pervasive involvement in the procurement of federal agency personnel and the NAFI is acting merely as a conduit for the federal agency. See Thayer Gate Dev. Corp., B-242847.2, Dec. 9, 1994 (unpublished) (involvement of high ranking Army officials in project did not convert procurement by a NAFI to one conducted by the Army).

## **E. When Must a Protest Be Filed?**

1. Time limits on protests are set forth in 4 C.F.R. § 21.2 (2000).<sup>5</sup>
  - a. **Defective Solicitation.** GAO must receive protests based on alleged improprieties or errors in a solicitation that are apparent on the face of the solicitation, i.e., patent ambiguities or defects, **prior to bid opening or the closing date for receipt of initial proposals.** 4 C.F.R. § 21.2(a)(1) (2000); Carter Indus., Inc., B-270702, Feb. 15, 1996, 96-1 CPD ¶ 99 (untimely challenge of agency failure to include mandatory clause indicating whether agency will conduct discussions prior to making award).
  - b. Protesters **challenging a Government-wide point of entry (GPE) or Commerce Business Daily (CBD) notice of intent** to make a sole source award must **first** respond to the CBD notice in a timely manner. See Norden Sys., Inc., B-245684, Jan. 7, 1992, 92-1 CPD ¶ 32 (unless the specification is so restrictive as to preclude a response, the protester must first express interest to the agency); see also PPG Indus., Inc., B-272126, June 24, 1996, 96-1 CPD ¶ 285, fn. 1 (timeliness of protests challenging CBD notices discussed).
  - c. When an **amendment to a solicitation** provides the basis for the protest, then the protest must be filed by the next due date for revised proposals. 4 C.F.R. § 21.2(a)(1) (2000).

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<sup>5</sup>Under the GAO bid protest rules, "days" are calendar days. In computing a period of time for protest (merits) purposes, do not count the day on which the period begins. When the last day falls on a weekend day or federal holiday, the period extends to the next working day. 4 C.F.R. § 21.0(e) (2000).

- d. **Required Debriefing.** Procurements involving competitive proposals carry with them the obligation to debrief the losing offerors, if the debriefing is timely requested. See FAR 15.505 and 15.506. In such cases, protesters may not file a protest prior to the debriefing date offered by the agency. The protester, however, must file its protest no later than 10 days “after the date on which the debriefing is held.” 4 C.F.R. § 21.2(3) (2000); Fumigadora Popular, S.A., B-276676, Apr. 21, 1997, 97-1 CPD ¶ 151 (protest filed four days after debriefing of **sealed bid procurement** not timely); The Real Estate Center, B-274081, Aug. 20, 1996, 96-2 CPD ¶ 74.
- e. **Government Delay of Pre-Award Debriefings.** The agency may delay pre-award debriefings until after award when it is in “the government’s best interests.” If the agency decides to delay a pre-award debriefing that is otherwise timely requested and required, the protester is entitled to a post-award debriefing and the extended protest time frame. Note that if a protester files its protest within five days of the offered debrief, protester will also be entitled to stay contract performance. 31 U.S.C. § 3553(d)(4)(B); FAR 33.104(c). Global Eng’g & Constr. Joint Venture, B-275999, Feb. 19, 1997, 97-1 CPD ¶ 77 (protest of exclusion from competitive range).
- f. Protests based on **any other matter** must be submitted within 10 days after receiving actual or constructive knowledge of the basis for protest. 4 C.F.R. § 21.2(a)(2) (2000). Learjet, Inc., B-274385, Dec. 6, 1996, 96-2 CPD ¶ 215 (interpretation of solicitation untimely); L. Washington & Assocs., Inc., B-274749, Nov. 18, 1996, 96-2 CPD ¶ 191 (untimely protest of elimination from competitive range).
- g. Protests initially filed with the agency:
  - (1) The agency protest must generally be filed within the same time restrictions applicable to GAO protests, unless the agency has established more restrictive time frames. 4 C.F.R. § 21.2(a)(3) (2000). Orbit Advanced Techs., Inc., B-275046, Dec. 10, 1996, 96-2 CPD ¶ 228 (protest dismissed where protester’s agency-level protest untimely even though it would have been timely under GAO rules); IBP, Inc., B-275259, Nov. 4, 1996, 96-2 CPD ¶ 169.

- (2) If the contractor previously filed a timely agency protest, a subsequent GAO protest must be filed within 10 days of formal notice, actual knowledge, or constructive knowledge of the initial adverse agency decision. 4 C.F.R. § 21.2(a)(3) (2000). Consolidated Mgt. Servs., Inc.--Recon., B-270696, Feb. 13, 1996, 96-1 CPD ¶ 76 (oral notice of adverse agency action starts protest time period). **Continuing to pursue agency protest after initial adverse decision does not toll the GAO time limitations.** Telestar Int'l Corp.--Recon., B-247029, Jan. 14, 1992, 92-1 CPD ¶ 69.
2. Protesters must use due diligence to obtain the information necessary to pursue the protest. See Automated Medical Prods. Corp., B-275835, Feb. 3, 1997, 97-1 CPD ¶ 52 (protest based on FOIA-disclosed information not timely where protester failed to request debriefing); Products for Industry, B-257463, Oct. 6, 1994, 94-2 CPD ¶ 128 (protest challenging contract award untimely where protester failed to attend bid opening and did not make any post-bid attempt to examine awardee's bid); Adrian Supply Co.--Recon., B-242819, Oct. 9, 1991, 91-2 CPD ¶ 321 (use of FOIA request rather than the more expeditious document production rules of the GAO may result in the dismissal of a protest for lack of due diligence and untimeliness). But see Geo-Centers, Inc., B-276033, May 5, 1997, 97-1 CPD ¶ 182 (protest filed three months after contract award and two months after debriefing is **timely** where the information was obtained via a FOIA request that was filed immediately after the debriefing).
3. Exceptions for otherwise untimely protests. 4 C.F.R. § 21.2(c) (2000).
- a. **Significant Issue Exception:** The GAO may consider a late protest if it involves an issue significant to the procurement system. See Pyxis Corp., B-282469, B-282469.2, Jul. 15, 1999, 99-2 CPD ¶ 18; Premier Vending, Inc., B-256560, Jul. 5, 1994, 94-2 CPD ¶ 8.
- b. Significant issues generally: 1) have not been previously considered; and 2) are of widespread interest to the procurement community. Pyxis Corp., B-282469, B-282469.2, Jul. 15, 1999, 99-2 CPD ¶ 18. DynCorp, Inc., B-240980, Oct. 17, 1990, 90-2 CPD ¶ 310.

- c. The GAO may consider a protest if there is good cause, beyond the protester's control, for the lateness. A.R.E. Mfg. Co., B-246161, Feb. 21, 1992, 92-1 CPD ¶ 210; Surface Combustion, Inc.--Recon., B-230112, Mar. 3, 1988, 88-1 CPD ¶ 230.

**F. “The CICA Stay”—Automatic Stay.** 31 U.S.C. § 3553(c) and (d).

1. Pre-award Protests:

- a. An agency may not award a contract after receiving notice of a timely protest **FROM THE GAO**. 31 U.S.C. § 3553(c); 4 C.F.R. § 21.6 (2000); FAR 33.104(b); AFARS 5133.104(b); AFFARS 5333.104(b).
- b. The automatic stay is triggered **only** by notice from GAO. See McDonald Welding v. Webb, 829 F.2d 593 (6<sup>th</sup> Cir. 1987); Survival Technology Inc. v. Marsh, 719 F. Supp. 18 (D.D.C. 1989). See also Florida Professional Review Org., B-253908.2, Jan. 10, 1994, 94-1 CPD ¶ 17 (no duty to suspend performance where protest filed on eighth day after award [Friday] but GAO notified agency of protest on eleventh day after award [Monday]).

2. Post-award Protests: The contracting officer shall suspend contract performance immediately when the agency receives notice of protest from the GAO **within 10 days of the date of contract award or within five days AFTER THE DATE OFFERED for the required post-award debriefing**. The CICA stay applies under either deadline, whichever is the later. 31 U.S.C. § 3553(d); 4 C.F.R. § 21.6 (2000); FAR 33.104(c); AFARS 5133.104(c); AFFARS 5333.104(c).

3. “Proposed Award” Protests: An agency's decision to cancel a solicitation based upon the determination that the costs associated with contract performance would be cheaper if performed in-house (i.e., by federal employees) may be subject to the CICA stay. See Inter-Con Sec. Sys., Inc. v. Widnall, No. C 94-20442 RMW, 1994 U.S. Dist. LEXIS 10995 (D.C. Cal. July 11, 1994); Aspen Sys. Corp., B-228590, Feb. 18, 1988, 88-1 CPD ¶ 166. In reviewing a protest of an in-house cost comparison, the GAO will look to whether the agency complied with applicable procedures in selecting in-house performance over contracting. DynCorp, B-233727.2, June 9, 1989, 89-1 CPD ¶ 543.

4. “The CICA Override”—Relief From The CICA Stay. 31 U.S.C. § 3553(c) and (d); FAR 33.104(b) and (c); AFARS 5133.104; AFFARS 5333.104.
  - a. Pre-Award Protest Stay: The head of the contracting activity may, on a nondelegable basis, authorize the award of a contract:
    - (1) Upon a written finding that urgent and compelling circumstances which significantly affect the interest of the United States will not permit waiting for the decision of the Comptroller General; **AND**
    - (2) The agency is likely to award the contract within 30 days of the written override determination.
  - b. Post-Award Protest Stay: The head of the contracting activity may, on a nondelegable basis, authorize **continued performance** under a previously awarded contract upon a written finding that:
    - (1) Continued performance of the contract is **in the best interests of the United States**; or
    - (2) Urgent and compelling circumstances that significantly affect the interest of the United States will not permit waiting for the decision of the Comptroller General.
  - c. In either instance, if the agency is going to override the automatic stay, it must notify the GAO. Banknote Corp. of America, Inc., B-245528, Jan. 13, 1992, 92-1 CPD ¶ 53 (GAO will not review the decision).
5. Override decisions, however, are subject to judicial review. See Dairy Maid Dairy v. United States, 837 F. Supp. 1370 (E.D. Va. 1993) (Army improperly overrode automatic stay by failing to consider using incumbent contractor to continue services; pre-award and post-award stays require separate determinations and findings); see also DTH Mgmt. Group v. Kelso, 844 F. Supp. 251 (E.D.N.C. 1993).



6. An agency's decision to override a GAO CICA stay based upon its determination that such action is in the best interests of the United States may or may not be subject to judicial review—depending on the federal circuit. Compare Foundation Health Fed. Servs. v. United States, No. 93-1717, 39 CCF ¶ 76,681 (D.D.C. 1993) with Management Sys. Applications Inc. v. Dep't of Health and Human Servs., No. 2:95cv320 (E.D. Va. Apr. 11, 1995).<sup>6</sup> But see Hughes Missile Sys. Co. v. Department of the Air Force, No. 96-937-A (E.D. Va. July 19, 1996).<sup>7</sup>

**G. Availability of Funds.** The “end-of-fiscal-year spending spree” results in a large volume of protest action during the August-November time frame. To allay worries about the loss of funds pending protest resolution, 31 U.S.C. § 1558 provides that funds will not expire for 100 days following resolution of the bid protest.<sup>8</sup> FAR 33.102(c).

**H. Scope of GAO Review.**

1. The scope of GAO's review of protests is similar to that of the Administrative Procedures Act. 5 U.S.C. § 706. GAO does not conduct a *de novo* review. Instead, it reviews the agency's actions for violations of procurement statutes or regulations, arbitrary or capricious actions, or abuse of discretion. New Breed Leasing Corp., B-274201, Nov. 26, 1996, 96-2 CPD ¶ 202 (agency violated CICA due to lack of reasonable advanced planning) But see Datacom, Inc., B-274175, Nov. 25, 1996, 96-2 CPD ¶ 199 (sole source award proper when the result of high-level political intervention); Serv-Air, Inc., B-258243, Dec. 28, 1994, 96-1 CPD ¶ 267; Hattal & Assocs., B-243357, July 25, 1991, 91-2 CPD ¶ 90.
2. The protester generally has the burden of demonstrating the agency action is clearly unreasonable. The Saxon Corp., B-232694, Jan. 9, 1989, 89-1 CPD ¶ 17.

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<sup>6</sup>See 63 FED. CONT. REP. 561-2 (1995) for a discussion of this case.

<sup>7</sup>For a published account of this case, see *Court Denies Hughes' Request to Enjoin JASSM Contracts Pending Resolution of Protest*, 66 FED. CONT. REP. 71 (1996).

<sup>8</sup>This authority applies to protests filed with the agency, at the GAO, or in a federal court. 31 U.S.C. § 1558. See also OFFICE OF THE GENERAL COUNSEL, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, *Principles of Federal Appropriations Law* 5-74 (2d ed. 1991).

3. When conducting its review, the GAO will consider the **entire** record surrounding agency conduct, to include statements and arguments made in response to the protest. AT&T Corp., B-260447, Mar. 4, 1996, 96-1 CPD ¶ 200. The agency may not, however, for the first time in a protest, provide its rationale for the decision in a request for reconsideration. Department of the Army—Recon., B-240647, Feb. 26, 1991, 91-1 CPD ¶ 211.
4. As part of its review, the GAO has demonstrated a willingness to probe factual allegations and assumptions underlying agency determinations or award decisions. See, e.g., Redstone Tech. Servs., B-259222, Mar. 17, 1995, 95-1 CPD ¶ 181; Secure Servs. Tech., Inc., B-238059, Apr. 25, 1990, 90-1 CPD ¶ 421 (GAO conducted a comparative analysis of competitors' proposals and the alleged deficiencies in them and sustained the protest when it determined that the agency had not evaluated the proposals in a consistent manner); Frank E. Basil, Inc., B-238354, May 22, 1990, 90-1 CPD ¶ 492 (GAO reviewed source selection plan).
5. If the protester alleges bad faith, the GAO will presume the agency acted in good faith. The protester must present "well-nigh irrefragable proof" of a specific and malicious intent to harm the protester. Sanstrans, Inc., B-245701, Jan. 27, 1992, 92-1 CPD ¶ 112.
6. Timeliness Exceptions. When challenging the timeliness of a protest, the burden is on the government. Packaging Corp. of America, B-225823, July 20, 1987, 87-2 CPD ¶ 65. If untimely on its face, the protester is required to include "all the information needed to demonstrate . . . timeliness." 4 C.F.R. § 21.2(b) (2000); Foerster Instruments, Inc., B-241685, Nov. 18, 1991, 91-2 CPD ¶ 464.
7. When there is a doubt as to whether a protest is timely, the GAO will generally consider the protest. CAD Language Sys., Inc., B-233709, Apr. 3, 1989, 89-1 CPD ¶ 405.

8. If a protester alleges that a requirement is unduly restrictive, the government must make a *prima facie* case that the restriction is necessary to meet agency needs. Mossberg Corp., B-274059, Nov. 18, 1996, 96-2 CPD ¶ 189 (solicitation requirements for procurement of shotguns overly restrictive). The burden then shifts to the protester to show that the agency justification is clearly unreasonable. See Morse Boulger, Inc., B-224305, Dec. 24, 1986, 86-2 CPD ¶ 715. See also Saturn Indus., B-261954, Jan. 5, 1996, 96-1 CPD ¶ 9 (Army requirement for qualification testing of transmission component for Bradley Fighting Vehicle was reasonable).
9. To prevail, a protester must demonstrate prejudice. To meet this requirement, a protester must show that but for the agency error, there existed “a substantial chance” that the offeror would have been awarded the contract. Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996). See, e.g., Bath Iron Works Corp., B-290470, Aug. 19, 2002, 2002 CPD ¶ 133 (denying protester's use of a decommissioned destroyer for at-sea testing, while at the same time accepting awardee's proposed use constituted unequal treatment, but did not result in competitive prejudice); Northrop Worldwide Aircraft Servs., Inc.—Recon., B-262181, June 4, 1996, 96-1 CPD ¶ 263 (agency failure to hold discussions); ABB Envtl. Servs., Inc., B-258258.2, Mar. 3, 1995, 95-1 CPD ¶ 126 (agency used evaluation criteria not provided for in solicitation).

## **I. Bid Protest Procedures.**

1. The Protest. 4 C.F.R. § 21.1 (2000).
  - a. Protests must be **written**. E-Mail filings now accepted. Go to GAO website for instructions in January 22, 2003 notice.
  - b. Although the GAO does not require formal pleadings submitted in a specific technical format, a protest, at a minimum, shall:
    - (1) include the name, address, telephone and facsimile (fax) numbers of the protester (or its representative);
    - (2) be signed by the protester or its representative;

- (3) identify the contracting agency and the solicitation and/or contract number;
- (4) **provide a detailed legal and factual statement of the bases of the protest, to include copies of relevant documents;**
- (5) provide all information demonstrating the protester is an interested party and that the protest is timely;
- (6) specifically request a decision by the Comptroller General; and
- (7) state the form of relief requested.

c. If appropriate, the protest may also include:

- (1) a request for a protective order;
- (2) a request for specific documents relevant to the protest; and,
- (3) a request for a hearing.

d. The GAO may dismiss a protest which is frivolous, or which does not state a valid ground for a protest. 31 U.S.C. ¶ 3554(a)(4); Federal Computer Int'l Corp.--Recon., B-257618, July 14, 1994, 94-2 CPD ¶ 24 (mere allegation of improper agency evaluation made "on information and belief" not adequate); see also Siebe Env'tl. Controls, B-275999, Feb. 12, 1997, 97-1 CPD ¶ 70 ("information and belief" allegations not adequate even though government delayed debriefing regarding competitive range exclusion).

- (1) At a minimum, a protester must make a *prima facie* case asserting improper agency action. Brackett Aircraft Radio, B-244831, Dec. 27, 1991, 91-2 CPD ¶ 585.

- (2) Generalized allegations of impropriety are not sufficient to sustain the protester's burden under the GAO's Bid Protest Rules. See 4 C.F.R. § 21.5(f) (2000); Bridgeview Mfg., B-246351, Oct. 25, 1991, 91-2 CPD ¶ 378; Palmetto Container Corp., B-237534, Nov. 5, 1989, 89-2 CPD ¶ 447.
    - (3) The protester must show material harm. Tek Contracting, Inc., B-245590, Jan. 17, 1992, 92-1 CPD ¶ 90 (protest that certification requirement was unduly restrictive is denied where protester's product was not certified by any entity); IDG Architects, B-235487, Sept. 18, 1989, 89-2 CPD ¶ 236.
  - e. The protest must include sufficient information to demonstrate that it is timely. The GAO will not permit protesters to introduce for the first time, in a motion for reconsideration, evidence to demonstrate timeliness. 4 C.F.R. § 21.2(b) (2000). Management Eng'g Assoc.--Recon., B-245284, Oct. 1, 1991, 91-2 CPD ¶ 276.
2. The protester must provide the contracting activity timely notice of the protest. This notification allows the agency to prepare its administrative report for the protest.
    - a. The agency must receive a complete copy of the protest and all attachments no later than one day after the protest is filed with the GAO. 4 C.F.R. § 21.1(e) (2000); Rocky Mountain Ventures, B-241870.4, Feb. 13, 1991, 91-1 CPD ¶ 169 (failure to give timely notice may result in dismissal of the protest).
    - b. The GAO will not dismiss a protest, absent prejudice, if the protester fails to timely provide the agency a copy of the protest document. Arlington Pub. Schs., B-228518, Jan. 11, 1988, 88-1 CPD ¶ 16 (although protester late in providing agency protest documents, agency already knew of protest and its underlying bases).
  3. The GAO generally provides immediate telephonic notice of a protest to the agency. **It is this notice by the GAO that triggers the CICA stay**, discussed above. 4 C.F.R. § 21.3(a) (2000).

4. Agency List of Documents. In response to a protester's request for production of documents, the agency must provide to all interested parties and the GAO **at least five days prior to submission of the administrative report** a list of:
  - a. documents or portions of documents which the agency has released to the protester or intends to produce in its report; and
  - b. documents which the agency intends to withhold from the protester and the reasons underlying this decision.
  - c. Parties to the protest must then file any objections to the agency list within two days of receipt of the list.
5. Agency's Administrative Report. The agency must **file an administrative report within 30 days** of telephonic notice by the GAO. 4 C.F.R. § 21.3(c) (2000); FAR 33.104(a)(3)(i). Subject to any protective order, discussed below, the agency will provide copies of the administrative report simultaneously to the GAO, protester(s), and any intervenors. 4 C.F.R. § 21.3(d) (2000).
  - a. Mandatory contents of an agency report. 4 C.F.R. § 21.3(c) (2000).
    - (1) The protest.
    - (2) The protester's proposal or bid.
    - (3) The successful proposal or bid.
    - (4) The solicitation.
    - (5) The abstract of bids or offers.
    - (6) A statement of facts by the contracting officer.

- (7) All evaluation documents.
    - (8) All relevant documents.
  - b. Also included are:
    - (1) Documents requested by the protester. 4 C.F.R. § 21.3(c) (2000).
    - (2) A legal memorandum suitable for forwarding to GAO;
    - (3) An index of all relevant documents provided under the protest.
  - c. Agencies must include all relevant documents in the administrative report. See Federal Bureau of Investigation—Recon., B-245551, June 11, 1992, 92-1 CPD ¶ 507 (incomplete report misled GAO about procurement's status).
  - d. Late agency reports. Given the relatively tight time constraints associated with the protest process, the GAO will consider agency requests for extensions of time on a case-by-case basis. 4 C.F.R. § 21.3(f) (2000).
- 6. Document Production.<sup>9</sup> Except as otherwise authorized by GAO, all requests for documents must be filed with GAO and the contracting agency no later than two days after their existence or relevance is known or should have been known, whichever is earlier. The agency then must either provide the documents or explain why production is not appropriate. 4 C.F.R. § 21.3(g) (2000).
- 7. Protective Orders. Either on its own initiative or at the request of a party to the protest, the GAO may issue a protective order controlling the treatment of protected information. 4 C.F.R. § 21.4 (2000).

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<sup>9</sup>**PRACTICE TIP:** Keep in mind that the government has every right to request relevant documents from the protester. See 4 C.F.R. 21.3(d) (2000). See also "GAO Orders Protester to Comply With Agency's Document Request," 61 FED. CONT. REP. 409 (1994).

- a. The protective order is designed to limit access to trade secrets, confidential business information, and information that would result in an unfair competitive advantage.
  - b. The request for a protective order should be filed as soon as possible. It is the responsibility of protester's counsel to request issuance of a protective order and submit timely applications for admission under the order. 4 C.F.R. § 21.4(a) (2000).
  - c. The GAO shall determine the terms of the protective order prior to the due date for the agency administrative report. 4 C.F.R. § 21.4(a) (2000).
  - d. Individuals seeking access to protected information may not be involved in the competitive decision-making process of the protester or interested party. 4 C.F.R. § 21.4(c) (2000).
- (1) Protesters may retain outside counsel or use in-house counsel, so long as counsel is not involved in the competitive decision-making process. Robbins-Gioia, Inc., B-274318, Dec. 4, 1996, 96-2 CPD ¶ 222 (access to protected material appropriate even though in-house counsel has regular contact with corporate officials involved in competitive decision-making); Mine Safety Appliance Co., B-242379.2, Nov. 27, 1991, 91-2 CPD ¶ 506 (retained counsel).
  - (2) The GAO grants access to protected information upon application by an individual. The individual must submit a certification of the lack of involvement in the competitive decision-making process and a detailed statement in support of the certification. Atlantic Research Corp., B-247650, June 26, 1992, 92-1 CPD ¶ 543.



- (3) The GAO may report violations of the protective order to the appropriate bar association of the attorney who violated the order, or may ban the attorney from GAO practice. Additionally, a party whose protected information is disclosed improperly retains all of its remedies at law or equity, including breach of contract. 4 C.F.R. § 21.4(d) (2000). See also “GAO Sanctions 2 Attorneys for Violating Terms of Protective Order by Releasing Pricing Info,” 65 FED. CONT. REP. 17 (1996).
  - (4) If the GAO does not issue a protective order, the government has somewhat more latitude in determining the contents of the administrative report. If the government chooses to withhold any documents from the report, it must include in the report a list of the documents withheld and the reasons therefor. The agency must furnish all relevant documents and all documents specifically requested by the protester. Absent a protective order, the agency may withhold protected information and submit such information to the GAO for *in camera* review. 4 C.F.R. § 21.4(b) (2000).
- e. If the agency fails to produce all relevant or requested documents, the GAO may impose sanctions. Among the possible sanctions are:
- (1) Providing the document to the protester or to other interested parties.
  - (2) Drawing adverse inferences against the agency. Textron Marine Sys., B-243693, Aug. 19, 1991, 91-2 CPD ¶ 162 (GAO refused to draw an adverse inference when an agency searched for and was unable to find a document that protester speculated should be in the files).
  - (3) Prohibiting the government from using facts or arguments related to the unreleased documents.

8. Protester must comment on the agency report within 10 days of receipt. Failure to comment or request a decision on the record will result in dismissal. 4 C.F.R. § 21.3(i) (2000). Keymiae Aero-Tech, Inc., B-274803.2, Dec. 20, 1996, 97-1 CPD ¶ 153; Piedmont Sys., Inc., B-249801, Oct. 28, 1992, 92-2 CPD ¶ 305 (agency's office sign-in log used to establish date when protester's attorney received agency report); Aeroflex Int'l, Inc., B-243603, Oct. 7, 1991, 91-1 CPD ¶ 311 (protester held to deadline even though the agency was late in submitting its report); Kinross Mfg. Co., B-232182, Sept. 30, 1988, 88-2 CPD ¶ 309.
9. Hearings. On its own initiative or upon the request of the protester, the government, or any interested party, the GAO may conduct a hearing in connection with a protest. The request shall set forth the reasons why the requester believes a hearing is necessary and why the matter cannot be resolved without oral testimony. 4 C.F.R. § 21.7(a) (2000).
  - a. The GAO officer has the discretion to determine whether or not to hold a hearing and the scope of the hearing.<sup>10</sup> Jack Faucett Assocs.--Recon., B-254421, Aug. 11, 1994, 94-2 CPD ¶ 72.
    - (1) As a general rule, the GAO conducts hearings where there is a factual dispute between the parties which cannot be resolved without oral examination or without assessing witness credibility, or where an issue is so complex that developing the protest record through a hearing is more efficient and less burdensome than proceeding with written pleadings only. Southwest Marine, Inc., B-265865, Jan. 23, 1996, 96-1 CPD ¶ 56 (as a result of improper destruction of evaluation documentation by agency, GAO requested hearing to determine adequacy of agency award decision); see also Allied Signal, Inc., B-275032, Jan. 17, 1997, 97-1 CPD ¶ 136 (protest involving tactical intelligence system required hearing and technical assistance from GAO staff).

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<sup>10</sup> According to the GAO's procedural rules, hearings are ordinarily conducted in Washington, D.C. The rule further notes that hearings may also be conducted by telephone. 4 C.F.R. § 21.7(c) (1998).

- (2) Absent evidence that a protest record is questionable or incomplete, the GAO will not hold a hearing “merely to permit the protester to reiterate its protest allegations orally or otherwise embark on a fishing expedition for additional grounds of protest” since such action would undermine GAO’s ability to resolve protests expeditiously and without undue disruption of the procurement process. Town Dev., Inc., B-257585, Oct. 21, 1994, 94-2 CPD ¶ 155.
- b. The GAO may hold pre-hearing conferences to resolve procedural matters, including the scope of discovery, the issues to be considered, and the need for or conduct of a hearing. 4 C.F.R. § 21.7(b) (2000).
  - c. Note that the GAO may draw an adverse inference if a witness fails to appear at a hearing or fails to answer a relevant question. This rule applies to the protester, interested parties and the agency. 4 C.F.R. § 21.7(f) (2000).
- 10. Alternative Dispute Resolution. The GAO has two available forms of alternative dispute resolution (ADR) – Negotiation Assistance and Outcome Prediction.
  - a. Negotiation Assistance. The GAO attorney will assist the parties with reaching a “win/win” situation. This type of ADR occurs usually with protests challenging a solicitation term or a cost claim.
  - b. Outcome Prediction. The GAO attorney will inform the parties of what he or she believes will be the protest decision. The losing party can then decide whether to withdraw or continue with the protest. Outcome prediction may involve an entire protest or certain issues of a multi-issue protest. The single most important criterion in outcome prediction is the GAO attorney’s confidence in the likely outcome of the protest.
  - c. For more information on GAO’s use of ADR techniques, see GAO’s Use of “Negotiation Assistance: and “Outcome Prediction” as ADR Techniques, Federal Contracts Report, vol. 71, page 72.

11. The GAO will issue a decision within 100 days after the filing of the protest.<sup>11</sup> 31 U.S.C. § 3554(a)(1); 4 C.F.R. § 21.9 (2000).
12. Express Option. 31 U.S.C. § 3554(a)(2); 4 C.F.R. § 21.10 (2000).
  - a. Decision in 65 days.
  - b. The protester, agency, or other interested party may request the express option in writing within five days after the protest is filed. The GAO has discretion to decide whether to grant the request. Generally, the GAO reserves use of this expedited procedure for protests involving relatively straightforward facts and issues.
  - c. The GAO has considerable flexibility in how a protest under the express option is conducted, to include accelerating the protest schedule and issuing a summary decision. 4 C.F.R. § 21.10(e) (2000).

## **J. Remedies.**

1. GAO decisions are “recommendations.” 31 U.S.C. § 3554; Rice Servs., Ltd. v. United States, 25 Cl. Ct. 366 (1992); Wheelabrator Corp. v. Chafee, 455 F.2d 1306 (D.C. Cir. 1971).
2. Agencies that choose not to implement GAO’s recommendations fully within 60 days of a decision must report this fact to the GAO. FAR 33.104(g). The GAO, in turn, must report all instances of agency refusal to accept its recommendation to Congress. 31 U.S.C. § 3554(e).
3. The GAO may recommend that an agency grant the following remedies (4 C.F.R. § 21.8) (2000):
  - a. Refrain from exercising options under an existing contract;

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<sup>11</sup>**PRACTICE TIP:** Parties to the protest may check on the status of their protest by calling GAO's bid protest status line at (202) 512-5436. Additionally, quick access to newly issued decisions can be obtained from the GAO Internet Homepage at: <http://www.gao.gov>.

- b. Termination of an existing contract;
  - c. Recompete the contract;
  - d. Issue a new solicitation;
  - e. Award of the contract consistent with statute and regulation; or
  - f. Such other recommendation(s) as the GAO determines necessary to promote compliance with CICA.
4. Impact of a Recommended Remedy. In crafting its recommendation, the GAO will consider all circumstances surrounding the procurement, to include: the seriousness of the deficiency; the degree of prejudice to other parties or the integrity of the procurement process; the good faith of the parties; the extent of contract performance; the cost to the government; the urgency of the procurement; and the impact on the agency's mission. 4 C.F.R. § 21.8(b) (2000).
5. CICA Override. However, where the head of the contracting activity decides to continue contract performance because it represents the best interests of the government, the GAO "shall" make its recommendation "without regard to any cost or disruption from terminating, recompeting, or reawarding the contract." 4 C.F.R. § 21.8(c) (2000). Department of the Navy – Modification of Remedy, B-274944.4, July 15, 1997, 97-2 CPD ¶ 16 (Navy contends that "it may not be able to afford" costs associated with GAO recommendation).

**K. Protest Costs, Attorneys Fees, and Bid Preparation Costs.**

1. The GAO will issue a declaration on the entitlement to costs of pursuing the protest, to include attorneys fees, in each case after agencies take corrective action. 4 C.F.R. § 21.8(d) (2000). The recovery of protest costs is neither an "award" to protester nor is it a "penalty" imposed upon the agency, but is "intended to relieve protesters of the financial burden of vindicating the public interest." Defense Logistics Agency—Recon., B-270228, Aug. 21, 1996, 96-2 CPD ¶ 80.

- a. In practice, if the agency takes remedial action promptly, GAO generally will not award fees. See J.A. Jones Management Servs., Inc., - - Costs B-284909.4, Jul. 31, 2000, 2000 CPD ¶ 123 (GAO declined to recommend reimbursement of costs where agency took corrective action promptly to supplemental protest allegation); Tidewater Marine, Inc.—Request for Costs, B-270602, Aug. 21, 1996, 96-2 CPD ¶ 81 (the determination of when the agency was on notice of error is “critical”); see also LORS Medical Corp., B-270269, Apr. 2, 1996, 96-1 CPD ¶ 171 (timely agency action measured from filing of initial protest, not time of alleged improper action by agency). The GAO has stated that, in general, if the agency takes corrective action by the due date of the agency report, such remedial action is timely. Kertzman Contracting, Inc., B-259461, May 3, 1995, 95-1 CPD ¶ 226 (agency’s decision to take corrective action one day before agency report due was “precisely the kind of prompt reaction” GAO regulations encourage); Holiday Inn - Laurel—Entitlement to Costs, B-265646, Nov. 20, 1995, 95-2 CPD ¶ 233 (agency took corrective action five days after comments filed by protester).
- b. If the agency delays taking corrective action unreasonably, however, the GAO will award fees. Griner’s-A-One Pipeline Servs., B-255078, July 22, 1994, 94-2 CPD ¶ 41, (corrective action taken two weeks following filing of agency administrative report found untimely). The GAO will consider the complexity of the protested procurement in determining what is timely agency action. Lynch Machiner Co., Inc., B-256279, July 11, 1994, 94-2 CPD ¶ 15 (protester’s request for costs denied where agency corrective action taken three months following filing of protest complaint).
- c. Agency corrective action must result in some competitive benefit to the protester. Tri-Ex Tower Corp., B-245877, Jan. 22, 1992, 92-1 CPD ¶ 100 (protester not entitled to fees and costs where the agency cancels a competitive solicitation and proposes to replace it with a sole source acquisition; no corrective action taken in response to the protest).
- d. Protester must file its request for declaration of entitlement to costs with the GAO within 15 days after learning (or should have learned) that GAO has closed the protest based on the agency's decision to take corrective action. 4 C.F.R. § 21.8(e)(2004). Dev Tech Sys., Inc., B-284860.4, Aug. 23, 2002, CPD ¶ 150.

2. If the GAO determines that the protester is entitled to recover its costs:
  - a. The protester must submit a claim for costs within 60 days of the receipt of the GAO decision. Failure to file within 60 days may result in forfeiture of the right to costs. 4 C.F.R. § 21.8(f) (2000). See Aalco Forwarding, Inc., B-277241.30, July 30, 1999, 99-2 CPD ¶ 36 (protesters' failure to file an **adequately** supported initial claim within the 60-day period resulted in forfeiture of right to recover costs). See also Dual Inc. - - Costs, B-280719.3, Apr. 28, 2000 (rejecting claim for costs where claim was filed with contracting agency more than 60 days after protester's counsel received a protected copy of protest decision under a protective order).
  - b. Recovery of costs is limited to those costs incurred in pursuing the claim before the GAO. 4 C.F.R. § 21.8(f)(2) (2000); DIVERCO, Inc.—Claim for Costs, B-240639, May 21, 1992, 92-1 CPD ¶ 460.
3. Interest on costs is not recoverable. Techniarts Eng'g—Claim for Costs, B-234434, Aug. 24, 1990, 90-2 CPD ¶ 152.
4. Amount of attorney's fees and protest costs is determined by reasonableness. See, e.g., JAFIT Enters., Inc. – Claim for Costs, B-266326.2, Mar. 31, 1997, 97-1 CPD ¶ 125 (GAO allowed only 15% of protest costs and fees). Equal Access to Justice Act standards do **not** apply. Attorneys' fees (for other than small business concerns) are limited to not more than \$150 per hour, "unless the agency determines based on the recommendation of the Comptroller General on a case-by-case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 31 U.S.C. § 3554(c)(2)(B)(2004). See also Sodexho Mgmt., Inc. --- Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136. Similarly, fees for experts and consultants are capped at "the highest rate of compensation for expert witness paid by the Federal Government." 31 U.S.C. § 3554(c)(2); FAR 33.104(h) (2000).<sup>12</sup>

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<sup>12</sup>The FAR refers to 5 U.S.C. § 3109 and Expert and Consultant Appointments, 60 Fed. Reg. 45649, Sept. 1, 1995, citing 5 C.F.R. § 304.105.

5. Unlike the EAJA, a protestor need not be a “prevailing party” where a “judicial imprimatur” is necessary to cause a change in the legal relationship between the parties. Georgia Power Company, B-289211.5, May 2, 2002, 2002 CPD ¶ 81 (rejecting the agency’s argument that the Supreme Court’s holding in Buckhannon Bd. and Care Home, Inc., v. W. VA. Dep’t of HHR, 532 U.S. 598 (2001) rejecting the “catalyst theory” to fee-shifting statutes, applied to the Competition in Contracting Act).
  
6. As a general rule, a protestor is reimbursed costs incurred with respect to all protest issues pursued, not merely those upon which it prevails. AAR Aircraft Servs.---Costs, B-291670.6, May 12, 2003. 2003 CPD ¶ 100. Department of the Army --- Modification of the Remedy, B-292768.5, Mar. 25, 2004. 2004 CPD ¶ 74. The GAO has limited award of costs to successful protestors where part of their costs is allocable to a protest issue that is so clearly severable as to essentially constitute a separate protest. TRESP Associates, Inc. - - Costs, B-258322.8, Nov. 3, 1998, 98-2 CPD ¶ 108 (no need to allocate attorneys’ fees between sustained protest and those issues not addressed where all issues related to same core allegation that was sustained); Interface Flooring Sys., Inc. --- Claim for Attorneys Fees, B-225439.5, July 29, 1987, 87-2 CPD ¶ 106.
  
7. A protestor may recover costs on a sustained protest despite the fact that the protestor did not raise the issue that the GAO found to be dispositive. The GAO may award costs even though the protest is sustained on a theory raised by the GAO *sua sponte*. Department of Commerce—Recon., B-238452, Oct. 22, 1990, 90-2 CPD ¶ 322.
  
8. The protestor must document its claim for attorneys fees. Consolidated Bell, Inc., B-220425, Mar. 25, 1991, 91-1 CPD ¶ 325 (claim for \$376,110 reduced to \$490 because no reliable supporting documentation). See also Galen Medical Associates, Inc., B-288661.6, July 22, 2002, 2002 CPD ¶ 56 (GAO recommending that the agency reimburse the protestor \$110.65 out of the \$159,195.32 claim due to a lack of documentation).
  
9. Bid Preparation Costs. 4 C.F.R. § 21.8(d)(2) (2000).
  - a. **Anticipatory profits are not recoverable.** Keco Indus., Inc. v. United States, 192 Ct. Cl. 773, 784 (1970); DaNeal Constr., Inc., B-208469, Dec. 14, 1983, 83-2 CPD ¶ 682.



- b. GAO has awarded bid preparation costs when no other practical relief was feasible. See, e.g., Tri Tool, Inc.—Modification of Remedy, B-265649.3, Oct. 9, 1996, 96-2 CPD ¶ 139.
- c. As with claims for legal fees, the protester must document its claim for bid preparation and protest costs. A protester may not recover profit on the labor costs associated with prosecuting a protest or preparing a bid. Innovative Refrigeration Concepts — Claim for Costs, B-258655.2, July 16, 1997, 97-2 CPD ¶ 19 (protester failed to show that claimed rates for employees reflected actual rates of compensation).

**L. “Appeal” of the GAO Decision.**

- 1. Reconsideration of GAO Decisions. The request for reconsideration must be submitted to the GAO within 10 days of learning of the basis for the request or when such grounds should have been known, whichever is earlier. Speedy Food Serv., Inc.—Recon., B-274406, Jan. 3, 1997, 97-1 CPD ¶ 5 (request for reconsideration untimely where it was filed more than 10 days after protester noted the initial decision on GAO’s Internet site). The requester must state the factual and legal grounds upon which it seeks reconsideration. Rehashing previous arguments is not fruitful. 4 C.F.R. § 21.14 (2000); Banks Firefighters Catering, B-257547, Mar. 6, 1995, 95-1 CPD ¶ 129; Windward Moving & Storage Co.—Recon., B-247558, Mar. 31, 1992, 92-1 CPD ¶ 326.
- 2. Requests for reconsideration must be based upon new facts, unavailable at the time of the initial protest. The GAO does not allow piecemeal development of protest issues. Consultants on Family Addiction — Recon., B-274924.3, June 12, 1997, 97-1 CPD ¶ 213; Department of the Army — Recon., B-254979, Sept. 26, 1994, 94-2 CPD ¶ 114.
- 3. The GAO will not act on a motion for reconsideration if the underlying procurement is the subject of federal court litigation, unless the court has indicated interest in the GAO’s opinion. Department of the Navy, B-253129, Sept. 30, 1993, 96-2 CPD ¶ 175.

4. A protester always may seek judicial review of an agency action under the Administrative Procedures Act. Courts may, however, give great deference to the GAO in light of its considerable procurement expertise. Shoals American Indus., Inc. v. United States, 877 F.2d 883 (11<sup>th</sup> Cir. 1989). But see California Marine Cleaning, Inc. v. United States, 42 Fed. Cl. 281 (1998) (COFC overturned GAO decision finding that GAO's decision was irrational, that GAO misapplied the late bid rule, and that it failed to consider all relevant evidence).
5. This deference is not absolute. A court may still find an agency decision to lack a rational basis, even if the agency complies with the GAO's recommendations in a bid protest. Firth Constr. Co. v. United States, 36 Fed. Cl. 268, 271-72 (1996); Advanced Distribution Sys., Inc. v. United States, 34 Fed. Cl. 598, 604 n. 7 (1995); see also Mark Dunning Indus. v. Perry, 890 F. Supp. 1504 (M.D. Ala. 1995) (court holds that "uncritical deference" to GAO decisions is inappropriate). But see Honeywell, Inc. v. United States, 870 F.2d 644, 648 (Fed. Cir. 1989) (Federal Circuit notes that "it is the usual policy, if not the obligation, of procuring departments to accommodate themselves to positions formally taken by the Government Accountability Office").

#### **IV. UNITED STATES COURT OF FEDERAL CLAIMS.**

##### **A. Statutory Authority.**

1. Tucker Act. The Tucker Act grants the U.S. Court of Federal Claims (COFC) jurisdiction to decide any claim for damages against the United States founded upon the Constitution, Act of Congress, agency regulation, or express or implied-in-fact contract with the United States not sounding in tort. 28 U.S.C. § 1491.
2. Federal Courts Improvement Act of 1982. The COFC also was granted authority by the Federal Courts Improvements Act of 1982, Pub. L. No. 97-164, § 133(a), 96 Stat. 25, 40 (1982), 28 U.S.C. § 1491(a)(3), "to afford complete relief on any contract claim brought before the contract is awarded including declaratory judgments, and such equitable and extraordinary relief as it deems proper" (i.e., injunctive relief).

3. Administrative Dispute Resolution Act of 1996. On 30 September 1996, Congress passed the Administrative Dispute Resolution Act of 1996. Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996) [hereinafter “ADRA”]. Effective December 31, 1996, ADRA provides jurisdiction to both the Court of Federal Claims and the federal district courts to hear pre-award and post-award bid protests. Specifically, the COFC has jurisdiction to hear protests by interested parties that object to a solicitation, proposed award, or alleged violation of statute. 28 U.S.C. § 1491(b)(1).
  - a. The ADRA directs the COFC to “give due regard” to national security/defense interests and “the need” for expeditious processing of protests. Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996) (adding 28 U.S.C. § 1491(b)(3)).
  - b. The COFC has indicated that it will apply bid protest law developed by the U.S. District Court of the District of Columbia under the “Scanwell doctrine.” (Scanwell Lab., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970)). See United States Court of Federal Claims, Court Approved Guidelines for Procurement Protest Cases (Dec. 11, 1996).

**B. New COFC Rules.** On 1 May 2002, the COFC issued new rules (RCFC), which describes standard bid protest practices before the court. Available at <http://www.uscfc.uscourts.gov/rules.htm>. Appendix C of the new rules provides procedural guidance specifically tailored for bid protest litigation to enhance the overall effectiveness of protest resolution at the COFC. (The guidance provided by Appendix C of the RCFC is cited throughout the remainder of this outline section.)

**C. Who May Protest?**

1. Interested Party. In its guidelines, the COFC states that for procurement protests, an interested party “is defined in 31 U.S.C. § 3551(2),” which is the same definition as that used in GAO protests. COFC Guidelines Preamble. CC Distribs., Inc. v. United States, 38 Fed.Cl. 771 (1997); but see CCL Inc. v. United States, 39 Fed. Cl. 780 (1997) (noting that “there is not a perfect joinder between the GAO’s definition of interested party and the Tucker Act’s jurisdictional waiver”). The CAFC has apparently resolved the issue of who is an “interested party” by adopting the GAO definition. See Am. Fed.’n Gov’t Employees, AFL-CIO v. United States, 258 F.3d 1294, 1302 (Fed. Cir. 2001) (Construing that the Section 1491(b)(1) did not adopt the APA’s liberal standing standards, but rather the narrow standards set forth in Section 3551(2)). See also, Myers Investigative & Sec Serv., Inc. v United States, 2002 U.S. App. LEXIS 237 (January 8, 2002).
2. Intervenor. The COFC allows parties to intervene as a matter of right and allows permissive intervention. RCFC, Rule 24.
  - a. Intervention of Right. Allowed when the right of intervention is mandated by statute or the applicant for intervention has an interest relating to the property or transaction that is the subject of the protest. RCFC 24(a). Case law developed by the U.S. District Court of the District of Columbia suggests that the protester must be able to demonstrate some “injury-in-fact” or otherwise be within the “zone of interest” of the statute or regulation to have standing before the court. See Scanwell Lab. Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970). See also Control Data Corp. v. Baldridge, 655 F.2d 283 (D.C. Cir. 1981).
  - b. Permissive Intervention. The COFC may allow permissive intervention by parties with a claim or question of law or fact that is “in common” with that of the main action. The court will consider whether such intervention will “unduly delay or prejudice the adjudication” of the main action. RCFC 24(b).
  - c. Intervention by the Proposed Awardee. An “apparent successful bidder” may enter an appearance at any hearing on an application for injunctive relief. RCFC 65(f). But see Anderson Columbia Envtl., Inc., 42 Fed. Cl. 880 (1999) (holding that contract awardee was not permitted to intervene as its interests were represented adequately by an existing party, i.e., the government).

3. The court permits third party practice. RCFC 14.
4. Effect of Judicial Proceedings. A protester may file its protest with the COFC despite the fact that it was the subject of a GAO protest.

**D. What May Be Protested?** The ADRA of 1996, Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996) (amending 28 U.S.C. § 1491).

1. An “interested party” may challenge the terms of a solicitation, a proposed award, the actual contract award, or any alleged violation of statute or regulation associated with a procurement or proposed procurement. 28 U.S.C. § 1491(a). See CCL Inc. v. United States, 39 Fed. Cl. 780 (1997) (protester has standing to challenge out-of-scope contract change).

2. The COFC has jurisdiction to hear both pre- and post-award protests. 28 U.S.C. § 1491(b)(1). It will not, however, review a protest that GAO did not follow its own bid protest procedures. Advance Construction Services, Inc., v. U.S., 51 Fed. Cl. 362 (2002).

#### **E. When Must a Protest Be Filed?**

1. Unlike protests filed with the GAO, the COFC currently has no specific timeliness requirement. Generally, however, one would expect protests to be filed very quickly in order to demonstrate the immediate and irreparable harm necessary to obtain injunctive relief. Hence, the COFC will “typically” schedule a temporary restraining order (TRO) hearing within one business day of filing of the TRO application. COFC Guidelines ¶ 7.
2. Defective Solicitation. The COFC appears to have adopted the GAO rule that the agency must receive protests based on alleged improprieties or errors in a solicitation that are apparent on the face of the solicitation, i.e., patent ambiguities or defects, **prior to bid opening or the closing date for receipt of initial proposals**. See Aerolease Long Beach v. United States, 31 Fed. Cl. 342 (1994), aff’d 39 F.3d 1198 (Fed. Cir. 1994); see also ABF Freight System Inc. v. U.S., 2003 U.S. Claims LEXIS 36, Feb. 26, 2003; see generally 4 C.F.R. § 21.2(a)(1) (1998).
3. Absent a need to show immediate and irreparable harm, actions must be commenced within six years of the date the right of action first accrues. 28 U.S.C. § 2401(a).

#### **F. Temporary Restraining Orders and Preliminary Injunctions.**

1. RCFC 65(a) provides for Temporary Restraining Orders and Preliminary Injunctions. The court applies the traditional four-element test. Cincom Sys., Inc. v. United States, Feb. 13, 1997, 41 CCF ¶ 77,078 (Fed.Cl. 1997); Magnavox Elec. Sys., Co. v. United States, 26 Cl. Ct. 1373, 1378 (1992); We Care, Inc. v. Ultra-Mark, Int’l Corp., 930 F.2d 1567 (Fed. Cir. 1991); Zenith Radio Corp. v. United States, 710 F.2d 806, 809 (Fed. Cir. 1983). These elements are:

- a. Likelihood of success on the merits; Cincom Sys., Inc. v. United States, 37 Fed. Cl. 266 (1997) (court considered fact that plaintiff lost in earlier GAO protest);
  - b. Degree of immediate irreparable injury if relief is not granted; Magellan Corp. v. United States, 27 Fed. Cl. 446, 448 (1993) (no irreparable harm if protester will have other opportunities to supply product);
  - c. Degree of harm to the party being enjoined if relief is granted; Magellan Corp. v. United States, 27 Fed. Cl. 446, 448 (1993); Rockwell Int'l Corp. v. United States, 4 Cl. Ct. 1, 6 (1983) (injunctive relief should be denied when national security and defense concerns are raised); and,
  - d. Impact of the injunction on public policy considerations. Cincom Sys., Inc. v. United States, Feb. 13, 1997, 37 Fed. Cl. 266 (1997), citing Southwest Marine, Inc. v. United States, 3 Cl. Ct. 611, 613 (1983) (public policy places national security/defense interests over public interest in fair and open competition).
3. Posting of Bonds and Securities. A protester must post bond via an “acceptable surety” in order to obtain a preliminary injunction. The COFC determines the sum of the bond security. This security covers the potential costs and damages incurred by the agency if the court subsequently finds that the government was unlawfully enjoined or restrained. RCFC 65(b).
    - a. If the agency voluntarily agrees to withhold award or contract performance, there is no bonding requirement. COFC Guidelines ¶ 6.
    - b. Only bonding companies holding certificates of authority from the Secretary of the Treasury are “acceptable sureties.” RCFC 65.1.
  4. In its published guidelines, the COFC has indicated that it will handle TRO hearings involving out-of-town attorneys via teleconference. The guidance further states that “the judge might require the Government to appear in person, in any event.” COFC Guidelines ¶ 7.

**G. Standard of Review.**

1. The COFC will review the agency's action pursuant to the Administrative Procedures Act (APA). 5 U.S.C. § 706. The court looks to whether the agency acted arbitrarily, capriciously, or not otherwise in accordance with law. COFC Guidelines Preamble. Cubic Applications, Inc. v. United States, 37 Fed. Cl. 339, 342 (1997). See also Impresa Construzioni Geom. Domenico Garufi v. United States, 283 F.3d 1324 (Fed. Cir. 2001) (allowing for review of a contracting officer's affirmative responsibility determination if there has been a violation of a statute or regulation, *or alternatively, if the agency determination lacked a rational basis*).
2. The plaintiff must demonstrate either that the agency decision-making process lacks a rational basis or that there is a clear and prejudicial violation of applicable statutes or regulations. Data General Corp. v. Johnson, 78 F.3d 1556 (Fed. Cir. 1996); Magellan Corp. v. United States, 27 Fed. Cl. 446 (1993); RADVA Corp. v. United States, 17 Cl. Ct. 812 (1989). The court will consider any one, or all, of the following four factors in determining whether the agency abused its discretion or acted in an arbitrary or capricious manner:
  - a. Subjective bad faith on the part of the agency official;
  - b. Absence of a reasonable basis for the agency decision or action;
  - c. Amount of discretion given by procurement statute or regulation to the agency official; and
  - d. Proven violation of pertinent statutes or regulations. See Prineville Sawmill Co. v. United States, 859 F.2d 905, 911 (Fed. Cir. 1988).
3. To obtain a permanent injunction, the plaintiff must show by a preponderance of the evidence that the challenged action is irrational, unreasonable, or violates an acquisition statute or regulation. See Isratex, Inc. v. United States, 25 Cl. Ct. 223 (1992); see also Logicon, Inc., 22 Cl. Ct. 776 (1991) (plaintiff need only demonstrate likelihood of success on the merits for temporary restraining order).



4. The court may give decisions by the Government Accountability Office great deference. Honeywell, Inc. v. United States, 870 F.2d 644 (Fed Cir. 1989). This deference, however, is not absolute. See Health Sys. Mktg. & Dev. Corp. v. United States, 26 Cl. Ct. 1322 (1992); California Marine Cleaning, Inc. v. United States, 42 Fed. Cl. 281 (1998) (COFC overturned GAO decision finding that GAO's decision was irrational, that GAO misapplied the late bid rule, and that it failed to consider all relevant evidence).

**H. Agency Administrative Record.** The court accomplishes its review “based upon an examination of the ‘whole record’ before the agency.” Cubic Applications, Inc. v. United States, 37 Fed.Cl. 339, 342 (1997). RCFC, Appendix C, ¶ 21, encourages early production of the “core documents” of the administrative record to “expedite the final resolution of the case.”

1. Core Documents. The “core documents” of the Administrative Record include, as appropriate, the:
  - a. Agency's procurement request, purchase request, or statement of requirements;
  - b. Agency's source selection plan;
  - c. Bid abstract or prospectus of bid;
  - d. Commerce Business Daily or other public announcement of the procurement;
  - e. Solicitation, including any instructions to offerors, evaluation factors, solicitation amendments, and requests for best and final offers;
  - f. Documents and information provided to bidders during any pre-bid or pre-proposal conference;
  - g. Agency's responses to any questions about or requests for clarification of the solicitation;

- h. Agency's estimates of the cost of performance;
- i. Correspondence between the agency and the protester, awardee, or other interested parties relating to the procurement;
- j. Records of any discussions, meetings, or telephone conferences between the agency and the protester, awardee, or other interested parties relating to the procurement;
- k. Records of the results of any bid opening or oral motion auction in which the protester, awardee, or other interested parties participated;
- l. Protester's, awardee's, and other interested parties' offers, proposals, or other responses to the solicitation;
- m. Agency's competitive range determination, including supporting documentation;
- n. Agency's evaluations of the protester's, awardee's, or other interested parties' offers, or other responses to the solicitation, proposals, including supporting documentation;
- o. Agency's source selection decision, including supporting documentation;
- p. Pre-award audits, if any, or surveys of the offerors;
- q. Notification of contract award and executed contract;
- r. Documents relating to any pre- or post-award debriefing;
- s. Documents relating to any stay, suspension, or termination of award or performance pending resolution of the bid protest;

- t. Justifications, approvals, determinations and findings, if any, prepared for the procurement by the agency pursuant to statute or regulation; and
  - u. The record of any previous administrative or judicial proceedings relating to the procurement, including the record of any other protest of the procurement.
2. Supplementing the Administrative Record. The COFC may allow supplementation of the administrative record in limited circumstances. Cubic Applications, Inc. v. United States, 37 Fed.Cl. 339, 342 (1997) citing Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989) (“little weight” given “*post hoc* rationalizations by the agency”); Graphicdata, LLC v. United States, 37 Fed. Cl. 771, 779 (1997). The reasons recognized by the COFC for supplementing the administrative record include:
- a. When the agency action is not adequately explained in the record before the court;
  - b. When the agency failed to consider factors which are relevant to its final decision;
  - c. When the agency considered evidence not included in the record;
  - d. When the case is so complex that additional evidence will enhance understanding of the issues;
  - e. Where evidence arising after the agency action shows whether the decision was correct;
  - f. Cases where the agency is sued for failure to take action;
  - g. Cases arising under the National Environmental Policy Act; and
  - h. Cases where relief is at issue, particularly with respect to injunctive relief.

## I. Procedures.

1. The court conducts a civil proceeding without a jury, substantially similar to proceedings in federal district courts. As noted above, the court has its own rules of procedure.
2. The COFC follows the Federal Rules of Civil Procedure “to the extent possible.” RCFC 1(b). Consequently, RCFCs correspond to their counterparts within the Federal Rules of Civil Procedure. The rules with decimals, e.g., Rule 65.1, represent modifications to the federal rules.
3. Additionally, the plaintiff must be represented by counsel who is admitted to practice before the court. RCFC 81(a). Finast Metal Prods., Inc. v. United States, 12 Cl. Ct. 759 (1987). RCFC, Appendix C, ¶ 25, allows counsel who are not yet members of the COFC bar to make initial filings in a bid protest case (i.e., complaint and other accompanying pleadings), “conditioned upon counsel’s prompt pursuit of admission to practice” before the COFC.
4. Notification. The protester must hand deliver two copies of all pleadings to the Department of Justice (DOJ), Commercial Litigation Branch, Civil Division. Additionally, the protester must notify by telephone and serve counsel for the “apparent successful bidder” any application for injunctive relief.
5. Requirement for Pre-Filing Notification. The COFC requires the protester to provide **at least** 24-hours advance notice of the protest filing to the DOJ, the COFC, the procuring agency, and any awardee(s). This requirement allows DOJ time to assign an attorney to the case and permits the COFC to identify the necessary assets to process the case. Although failure to provide pre-filing notice is not jurisdictional, it is “likely to delay the initial processing of the case.” RCFC, Appendix C, ¶ 2.
6. Initial Filings. As stated above, the protester generally initiates the COFC protest process with the filing of an application for injunctive relief. Specifically, the protest commences with the filing of a complaint. RCFC 3(a). Generally, the complaint is accompanied by the application for injunctive relief. RCFC 65. Additionally, any application must have with it the proposed order, affidavits, supporting memoranda, and other documents upon which the protester intends to rely. RCFC 65(f).

7. Initial Status Conference. The COFC will conduct an initial status conference to address pre-hearing matters, to include: identification of interested parties; any requests for injunctive relief and protective orders; the administrative file; and establishing a timetable for resolution of the protest. The COFC will schedule the initial status conference as soon as practicable following the filing of the complaint.
8. Agency Response. The government must respond to the protester's complaint within 60 days of filing. RCFC 12. Responses to motions must be accomplished within 14 days of service. RCFC 83.2(a). Responses to Rule 12(b) and 12(c) motions and summary judgment motions must be filed within 28 days of service. RCFC 83.2(c).
9. Discovery. The APA mandates that the court's decision should be based upon the agency record. 5 U.S.C. § 706; Camp. v. Pitts, 411 U.S. 138 (1973). Yet, the COFC has authorized limited discovery. Cubic Applications, Inc. v. United States, 37 Fed. Cl. 339 (1997) (deposition of contracting officer allowed); Aero Corp., S.A. v. United States, 38 Fed. Cl. 408 (1997) (in light of contemporaneous written explanations supporting procurement decision, deposing procurement officials improper).
10. Protective Orders. The COFC may issue protective orders upon motion by a party to either prevent discovery or to protect proprietary/source selection sensitive information from disclosure. RCFC 26(c). See General Order No. 38, United States Court of Federal Claims. But see Modern Technologies Corp. v. United States, 44 Fed. Cl. 319 (1998) (parties ordered to make available to the public documents that were filed previously under seal pursuant to a protective order because the proprietary and source-selection information had "minimal current value").
11. Hearings. Trial is mandatory unless the case is appropriate for summary judgment or otherwise has been dismissed. RCFC 39(a). If the case goes to trial, the hearing must be held at a location that is most convenient and least expensive for the public. 28 U.S.C. § 173.
12. Briefs. If a protest goes to trial, the COFC frequently requests post-hearing briefs. The format, content, and number of copies for submission of briefs are detailed in the court's procedural rules. RCFC 82-83.

13. Sanctions. The COFC must impose mandatory sanctions under RCFC 11 if a “[p]leading, motion or other paper is signed in violation this rule. . .” RCFC 11. The court **shall** impose sanctions on the person who signed the document in question, a represented party, or both. Id. See Miller Holzwarth, Inc v. United States and Optex Sys., 44 Fed. Cl. 156 (1999) (protester and its representative “effectively misled” the court, the government, and the awardee/intervenor by failing to disclose that it possessed source-selection information at the time that it filed its pleading).

#### **J. Remedies.**

1. Equitable relief, i.e., temporary restraining orders, preliminary injunctions, permanent injunctions, and declaratory judgment, is available. Protesters commencing action in this court usually seek injunctive relief.
2. Reasonable bid preparation costs are recoverable. Rockwell Int’l Corp. v. United States, 8 Cl. Ct. 662 (1985).
3. Anticipatory profits are not recoverable. Heyer Prods. Co. v. United States, 140 F. Supp. 409 (Ct. Cl. 1956); Compubahn, Inc. v. United States, 33 Fed. Cl. 677 (1995).
4. The cost of preparing for performance of an anticipated contract is not recoverable. Celtech, Inc. v. United States, 24 Cl. Ct. 269 (1991).
5. The cost of developing a prototype may be recovered. Coflexip & Servs., Inc. v. United States, 961 F.2d 951 (Fed. Cir. 1992).

#### **K. Attorneys Fees and Protest Costs.**

1. The court may award attorneys fees and protest costs pursuant to the Equal Access to Justice Act. 28 U.S.C. § 2412(d)(1)(A); Crux Computer Corp. v. United States, 24 Cl. Ct. 223 (1991); Bailey v. United States, 1 Cl. Ct. 69 (1983).

2. The traditional rule is that only those attorneys fees associated with the litigation are recoverable. Cox v. United States, 17 Cl. Ct. 29 (1989). But see Levernier Constr. Co. v. United States, 21 Cl. Ct. 683 (1990), rev'd 947 F.2d 497 (Fed. Cir. 1991) (costs associated with hiring an expert witness to pursue a claim with the contracting officer, prior to the litigation, not recoverable).
3. The Demise of the “**Catalyst Theory**.” Need more than a “voluntary change in the defendant’s conduct” to qualify as a “prevailing party.” Now there must be a “judicially sanctioned change in the parties’ relationship” to be considered a “prevailing party” under fee-shifting statutes. See Brickwood Contractors, Inc. v. U.S., 288 F.3d 1371 (Fed. Cir. 2002) (holding the Supreme Court’s decision in Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of HHR, 532 U.S. 598 (2001) was applicable to EAJA).

**L. Appeals.** Appeals from decisions of the Court of Federal Claims are taken to the United States Court of Appeals for the Federal Circuit. 28 U.S.C. § 1295(a)(3).

## **V. FEDERAL DISTRICT COURTS.**

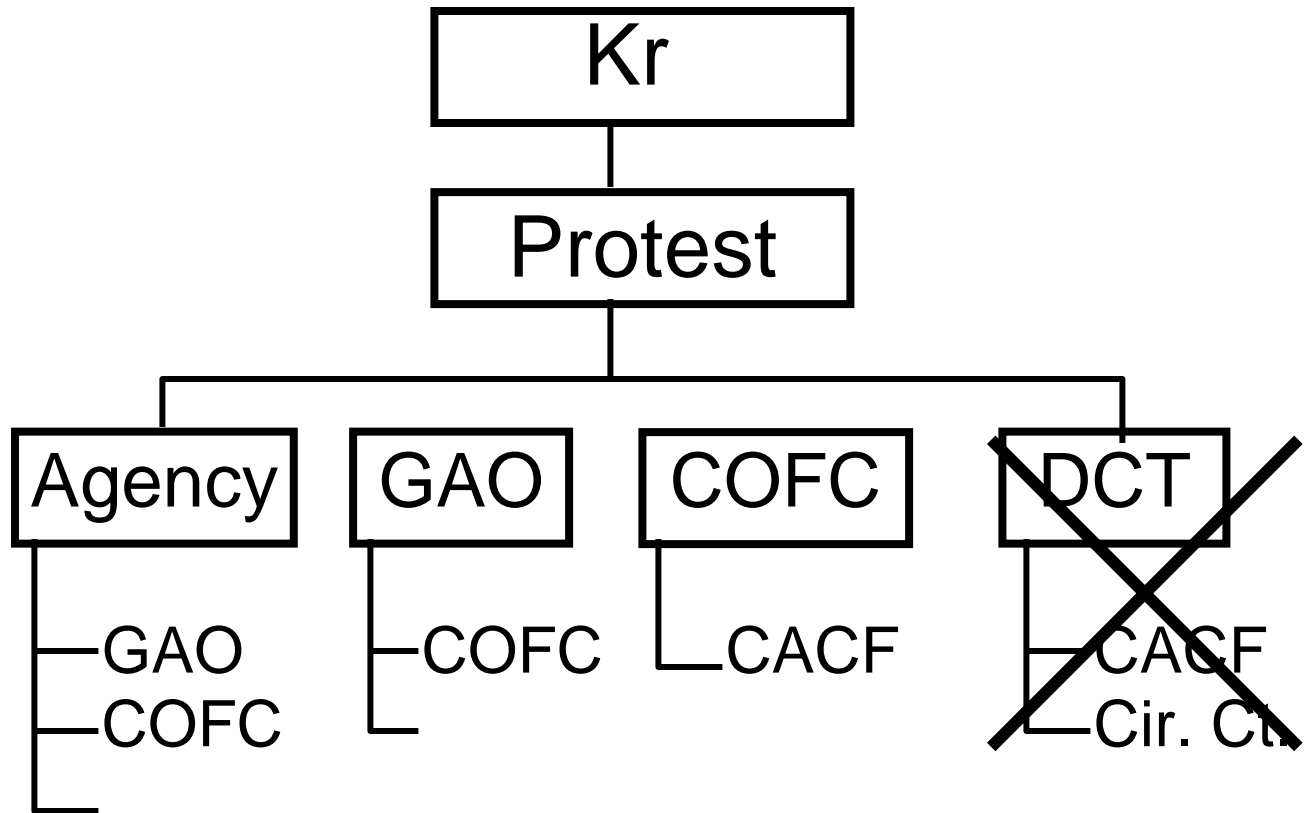
Prior to ADRA, federal district courts reviewed challenges to agency procurement decisions pursuant to the Administrative Procedures Act. 5 U.S.C. § 702. This authority was popularly known as the “Scanwell Doctrine.” Scanwell Lab., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).

The ADRA granted the federal district courts jurisdictional authority to hear pre-award and post-award bid protests. As with the COFC, the ADRA directed the district courts to “give due regard” to national security/defense interests and “the need” for expeditious processing of protests. Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996) (adding 28 U.S.C. § 1491(b)(3)). However, ADRA provided also for the “sunset” of the district courts bid protest jurisdiction as of 1 January 2001, unless Congress acted affirmatively to extend the jurisdiction. Congress did not extend the bid protest jurisdiction, and so it appears that the district courts can no longer review bid protests. Cases due remain, however, in the district courts that were filed prior to 1 January 2001.

## **VI. CONCLUSION.**

# Bid Protests

Multiple Forums



Appendix



## **APPENDIX A**

### **ALPHABETICAL LISTING OF CONTRACT ABBREVIATIONS**

#### **A**

AAA ..... U.S. Army Audit Agency  
ACAB ..... Army Contract Adjustment Board  
ACO ..... Administrative Contracting Officer  
ADA ..... Anti-Deficiency Act  
ADPE ..... Automatic Data Processing Equipment  
AFARS ..... Army Federal Acquisition Regulation Supplement  
AFFARS ..... Air Force Federal Acquisition Regulation Supplement  
AGBCA ..... Department of Agriculture Board of Contract Appeals  
AL ..... Acquisition Letter  
APF ..... Appropriated Funds  
AP Plan ..... Advance Procurement Plan  
AR ..... Army Regulation  
ASA(ALT) ..... Assistant Secretary of the Army for Acquisition, Logistics and Technology  
ASBCA ..... Armed Services Board of Contract Appeals  
ASPA ..... Armed Services Procurement Act of 1947  
ASPM ..... Armed Services Pricing Manual  
ASPR ..... Armed Services Procurement Regulation (replaced by the DAR)

#### **B**

BAA ..... Buy American Act or Broad Agency Announcement  
BCA ..... Board of Contract Appeals  
BCM ..... Business Clearance Memorandum  
BOA ..... Basic Ordering Agreement  
BPA ..... Blanket Purchase Agreement  
BPD ..... Board of Contract Appeals Bid Protest Decisions

## C

CAP.....	Commercial Activities Program
CAFC.....	U.S. Court of Appeals for the Federal Circuit
CAS.....	Cost Accounting Standards
CBA.....	Collective Bargaining Agreement
CCH.....	Commerce Clearing House
CDA.....	Contract Disputes Act of 1978
CFR.....	Code of Federal Regulations
CICA.....	Competition in Contracting Act
CO.....	Contracting Officer
COC.....	Certificate of Competency
COFC.....	U.S. Court of Federal Claims (formerly U.S. Claims Court)
COR.....	Contracting Officer's Representative
COTR.....	Contracting Officer's Technical Representative
CPD.....	Comptroller General's Procurement Decisions
CPAF.....	Cost-Plus-Award-Fee
CPFF.....	Cost-Plus-Fixed-Fee
CPIF.....	Cost-Plus-Incentive-Fee
CPPC.....	Cost-Plus-A-Percentage-of-Cost
CWAS.....	Contractor Weighted Average Share
CWAS-NA.....	Contractor Weighted Average Share - Not Applicable
CWHASSA.....	Contract Work Hours and Safety Standards Act

## D

DA.....	Department of the Army
DAC.....	Defense Acquisition Circular
DA Form.....	Department of the Army Form
DAR.....	Defense Acquisition Regulation (replaced by the FAR)
DARC.....	Defense Acquisition Regulatory Council
DBA.....	Davis-Bacon Act
DCA.....	Defense Communications Agency
DCAA.....	Defense Contract Audit Agency
DCMAO.....	Defense Contract Management Office
DCMA.....	Defense Contract Management Agency (formerly DCMC)
DCMCR.....	Defense Contract Management Command Region
DEAR.....	Department of Energy Acquisition Regulation
DFARS.....	Defense Federal Acquisition Regulation Supplement
DFAS.....	Defense Finance and Accounting Service
D&F.....	Determinations and Findings
DLA.....	Defense Logistics Agency
DLAAR.....	Defense Logistics Agency Acquisition Regulation
DOD.....	Department of Defense
DOE.....	Department of Energy

DOL ..... Department of Labor  
DOT ..... Department of Transportation  
DOT CAB ..... Department of Transportation Contract Appeals Board  
DPA..... Delegation of Procurement Authority  
DPC..... Defense Procurement Circular (replaced by the DAC)  
DPRO..... Defense Plant Representative's Office

## E

EAJA..... Equal Access to Justice Act  
EBCA..... Department of Energy Board of Contract Appeals  
EEO..... Equal Employment Opportunity  
ENG BCA ..... U.S. Army Corps of Engineers Board of Contract Appeals  
E.O. .... Executive Order  
8(a) ..... Section 8(a) of the Small Business Act

## F

FAC..... Federal Acquisition Circular  
FAR..... Federal Acquisition Regulation  
FARA ..... The Federal Acquisition Reform Act of 1996  
FASA ..... The Federal Acquisition Streamlining Act of 1994  
FCAA..... The Federal Courts Administration Act of 1992  
FCIA ..... The Federal Courts Improvement Act of 1982  
FFP ..... Firm-Fixed-Price  
FIPR ..... Federal Information Processing Resources  
FIRMR ..... Federal Information Resource Management Regulation  
FLSA..... Fair Labor Standards Act of 1938  
FMS..... Foreign Military Sales  
FP/EPA ..... Fixed Price Contract with Economic Price Adjustment  
FPASA ..... Federal Property and Administrative Services Act  
FPD ..... Federal Court Procurement Decisions  
FPI..... Federal Prison Industries (AKA UNICOR)  
FPR ..... Federal Procurement Regulation (replaced by the FAR)  
FY ..... Fiscal Year

## G

GAO..... General Accounting Office  
GBL..... Government Bill of Lading  
G&A..... General and Administrative Costs  
GFE ..... Government Furnished Equipment  
GFM..... Government Furnished Material  
GFP ..... Government Furnished Property  
GOCO ..... Government-Owned, Contractor-Operated

GOGO ..... Government-Owned, Government-Operated  
GPO..... Government Printing Office  
GSA..... General Services Administration  
GSAR..... General Services Administration Acquisition Regulation  
GSBCA ..... General Services Administration Board of Contract Appeals  
GWAC ..... Government-Wide Agency Contract

## **H**

HCA ..... Head of Contracting Activity  
HUD BCA..... Department of Housing and Urban Development Board of  
Contract Appeals

## **I**

IBCA ..... Department of Interior Board of Contract Appeals  
IFB ..... Invitation for Bids  
IL&FM..... Installation, Logistics and Financial Management  
IMPAC..... International Merchant Purchase Authorization Card  
ITMRA..... The Information Technology Management and Reform Act of 1996

## **J**

J&A ..... Justification and Approval  
JA ..... Judge Advocate  
JAGC..... Judge Advocate General's Corps  
JWOD..... Javits-Wagner-O'Day Act

## **K**

K..... Contract  
KO..... Contracting Officer  
Kr ..... Contractor

## **L**

LBCA ..... Department of Labor Board of Contract Appeals  
LOGCAP..... Logistics Civil Augmentation Program  
LOGJAMSS ..... Logistics Joint Administrative Management Support Services

## **M**

MIPR..... Military Interdepartmental Purchase Request  
MCA ..... Military Construction Appropriation Act  
MMCA..... Minor Military Construction, Army

## N

NAF..... Nonappropriated Fund  
NAFI ..... Nonappropriated Fund Instrumentality  
NAFTA ..... North American Free Trade Agreement  
NAPS ..... Navy Acquisition Procedures Supplement  
NASA..... National Aeronautics and Space Administration  
NASA BCA ..... National Aeronautics and Space Administration Board  
of Contracts Appeals (dissolved in 1993 and merged with ASBCA)  
NCD ..... Navy Contract Directives  
NIB/NISH.....National Industries for the Blind/National Industries for the Severely Disabled  
NSN..... National Stock Number

## O

OASD..... Office of the Assistant Secretary of Defense  
OFCC ..... Office of Federal Contract Compliance  
OFPP ..... Office of Federal Procurement Policy  
O&M..... Operation & Maintenance  
OMA ..... Operation & Maintenance, Army  
OPA..... Other Procurement, Army  
OSD..... Office of the Secretary of Defense

## P

PARC ..... Principal Assistant Responsible for Contracting  
PCO..... Procuring Contracting Officer  
PIL..... Procurement Information Letter (replaced by AL)  
PR&C..... Purchase Request and Commitment  
PSBCA..... U.S. Postal Service Boards of Contract Appeals  
PWD..... Procurement Work Directive  
PWS ..... Performance Work Statement

## Q

QPL ..... Qualified Products List

## R

R&D..... Research and Development  
RD&A..... Research, Development and Acquisition  
RDT&E ..... Research, Development, Test, and Evaluation  
RFP ..... Request for Proposals  
RFQ..... Request for Quotations  
RS..... Revised Statutes

Rule 4 File (R4) . Administrative Record Required by Rule Four of the Procedures of the  
..... Armed Services Board of Contract Appeals. *See* DFARS, App A.

## S

SADBU ..... Small and Disadvantaged Business Utilization  
SBA..... Small Business Administration  
SCA..... McNamara-O’Hara Service Contract Act of 1965  
SDB..... Small Disadvantaged Business  
SOW..... Statement of Work (now referred to as a PWS)  
SSA ..... Source Selection Authority  
SSAC..... Source Selection Advisory Council  
SSEB..... Source Selection Evaluation Board

## T

TAA ..... Trade Agreements Act  
TALF..... Trial Attorney Litigation File  
TAR..... Department of Transportation Acquisition Regulation  
TCO..... Termination Contracting Officer  
T for C..... Termination for Convenience (sometimes written T4C or T/C)  
T for D..... Termination for Default (sometimes written T4D or T/D)  
TINA..... Truth in Negotiations Act

## U

UMMCA ..... Unspecified Minor Military Construction, Army  
UMMIPS..... Uniform Material Movement and Issue Priority System  
UNICOR ..... A priority source under FAR Part 8; AKA Federal Prison Industries (FPI)  
USAREUR..... U.S. Army, Europe  
USD (A&T) ..... Under Secretary of Defense for Acquisition & Technology

## V

VABCA..... Department of Veterans Affairs Board of Contract Appeals  
VACAB..... Department of Veterans Affairs Contract Appeals Board

## W

WHA ..... Walsh-Healey Act  
WRD ..... Wage Rate Determination

